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—*Chester Associates*
MM Docket No. 84-525

Advisory Committee

Order adopted establishing an Advisory Committee to aid in implementation of reduction of satellite spacing to 2 degrees.
—*Reduced Orbital Spacing*

Amateur Radio Service

Amateur station license revoked and operator license suspended for term where licensee was found to have caused willful and malicious interference to other amateur operators by transmission of music over his radio station.
—*James W. Smith*
PR Docket No. 84-774

Application, Acceptance

Applicant's amendments as tendered for filing which proposed major changes resulting from loss of antenna sites, did not meet the criteria set forth in the Commission's June 23, 1982 *Public Notice* which announced a 90-day application amendment period for television translator and low power television applications, and the amendments are therefore dismissed.
—*American Christian TV System, Inc.*

Application, Amendment of, Change of Ownership

Review Board reversed ALJ's return of application to processing line as result of an amendment showing a change in ownership. Under Sec. 73.357(b) (as amended), changes in ownership interests do not constitute "major" changes unless they result in the original parties to the application retaining 50% or less of the ownership interests.
—*International B/c Consultants, Inc.*
MM Docket No. 84-157

Application, Amendment of, Effect on Pending Application

(See: Application, Amendment of, Change of Ownership-*International B/c Consultants, Inc.*)

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—*Alpha B/icing Corp.*

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Application for review denied. Local Spanish-language station entitled to carriage.

—*Service Electric Cable TV*

CATV Cross Ownership by Broadcasters

Petition for rule making to consider repeal of cable/local b/c TV station prohibition of Sec. 76.501 denied. Sec. 76.501(b)(2) amended to require divestiture of all existing egregious cable/broadcast TV cross-interests.

—*CATV Cross Ownership*

CATV, Non Video Transmission Services

The provision of non-video transmission service by a subsidiary of a company providing cable television is found to be not common carriage and prior state certification requirements applicable to the services are preempted because of the effect such requirements have on federal policies.

—*Cox Cable Communications, Inc.*

Cellular Communications Systems

Application for transfer of control of cellular joint venture granted. The public interest in development of efficient and competitive cellular systems warranted approval of transfer of cellular partnership interests despite initial findings adverse to transferor's character in connection with a large number of paging applications. The likelihood that alleged misconduct would adversely affect operation of cellular facilities was not so substantial as to warrant deferral of transfer application.

—*Cellular System One of Tulsa*

Commission denied Petition for Rulemaking to authorize wireline cellular carriers in area other than Metropolitan Statistical Areas to provide cellular service to fixed as well as mobile customers. Fixed cellular service is currently permitted to be offered by all cellular licensees in their licensed areas as an incidental service pursuant to Section 22.308 of the Rules.

—*Westcom Products, Inc.*

Change, Major

(See: Application, Amendment of, Change of Ownership-*International B/c Consultants, Inc.*)

Character Qualifications

Review Board affirmed I. D. grant to comparative applicant with moderate integration (100% v. 54%) and very slight comparative coverage (small 2nd service edge) preferences. Post-oral argument

supplement removed any doubt about financial qualifications. Affirmed ALJ's rulings denying petitions to enlarge issues to add financial, reporting, misrepresentation and character issues.
—*Marrow Enterprises, Inc.* MM Docket No. 83-941

Common Carrier, Definition
(See: CATV, Non Video Transmission Services-*Cox Cable Communications, Inc.*)

Common Carrier, Depreciation Rates, Prescription of
This order will prescribe depreciation rates and write-downs of net investment for Western Union's customer premises equipment.
—*Western Union Telegraph Co.*

Common Carrier, International
Report and Order adopting long-term facilities plans for the Pacific Ocean Region for the 1987-1995 time period. Approves the introduction of a fiber optic TPC-3 as early as 1988.
—*Pacific Telecommunications*
CC Docket No. 81-343

Common Carrier, Interconnection
By Direction Letter seeking recommendations from Alaska Public Utilities Commission regarding an appropriate policy governing allocation of toll interconnect facilities in Alaska's Bush Communities. Action taken because not apparent sufficient economic base to warrant hearings on duplicate facilities at villages.
—*Alaska Public Utilities*

Common Carrier, Microwave Radio
(See: Common Carrier Interconnection-*Alaska Public Utilities*)

Common Carrier, Mobile Radio
(See: Cellular Communications System-*Westcom Products, Inc.*)

Common Carrier, Rates, Just and Reasonable Charges
Commission determined that revenues received during 1978 violated FCC rate of return prescription order. Restitution ordered through reduction in future revenue requirement. Hearing instituted to insure that tariff filings that implement Commission's decision are in compliance with Commission's order and Communications Act.
—*AT&T Earnings*
CC Docket No. 79-187

Common Carrier, Rates, Just and Reasonable Charges
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—*Western Union Telegraph Co.*
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Common Carrier, Revenue Inquiry
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Comparative Case, New Criteria
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—*Video 44*
MM Docket No. 83-575

Comparative Coverage Issue
Review Board affirmed ALJ's Initial Decision. Losing applicant was not entitled to integration credit for principal who intends to work as bookkeeper and office and traffic manager. Even if accorded credit, however, losing applicant could not prevail because the preferences accorded winning applicant for comparative coverage and auxiliary power were sufficient to outweigh slight integration credit that loser would receive.
—*Makai Broadcasting, Inc.*
MM Docket No. 83-1113

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(See: Cellular Communications Systems-*Cellular System One of Tulsa*)

Cut-Off Rules
Low power TV and TV translator applications and major amendments may only be filed during window filing periods when announced by Commission Public Notice. Low power TV and TV translator applicants need no longer submit any showing or certification concerning financial qualifications.
—*Low Power TV*
MM Docket No. 83-1350

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Diversification of Control of Mass Media
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Employment, Equal Employment Opportunity Rule, Compliance with
When a station is located in an MSA and is reasonably accessible to centers of minority population, the Commission will use MSA labor force data in the initial evaluation of the station's EEO compliance

and in its determination of the reasonableness of the station's recruitment policies and efforts.
—*Delaware B/cing Co.*

Fairness Doctrine
On basis of a comprehensive record, Commission concluded fairness doctrine deserves the public interest. Commission found doctrine operates to inhibit presentation of controversial issues and questioned whether doctrine comports with First Amendment. As a result of explosive increase in information sources, Commission also determined the doctrine was no longer necessary to assure public had access to marketplace of ideas.
—*Fairness Doctrine*
MM Docket No. 84-282
Recognizing there are viable arguments on both sides of issue concerning whether or not fairness doctrine is codified, proposals to repeal doctrine are currently before Congress and Congress has intense interest in this policy, Commission decided not to eliminate or modify the doctrine. Despite its findings that doctrine deserves public interest, the FCC, deterred to Congressional perogative by providing Congress, its continuing review of doctrine, an opportunity to assess Commission's conclusions.
—*Fairness Doctrine*
MM Docket No. 84-282

Fairness Doctrine, Contrasting Viewpoint, Expression of
On basis of a comprehensive record, Commission determined the fairness doctrine in operation thwarts laudatory purpose it is designed to promote. Instead of furthering discussion of public issues, Commission found the doctrine inhibits b/cers from airing controversial issue programming. In addition, Commission expressed concern that administration of fairness doctrine has unintentionally resulted in stifling viewpoints which may be unorthodox, unpopular or unestablished.
—*Fairness Doctrine*
MM Docket No. 84-282

Fairness Doctrine, First Amendment, Effect on
Commission questioned whether fairness doctrine comports with First Amendment. While recognizing Supreme Court upheld the constitutionality of the doctrine in 1969, it opined that factual predicates underlying decision have been undermined. Commission found doctrine has a "chilling effect" on presentation of controversial issue programming. As a consequence, it stated the doctrine, in its view, cannot be justified as necessary to assure access to marketplace of ideas.
—*Fairness Doctrine*
MM Docket 84-282

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Monitoring
California service monitoring rule requiring customers with private terminal equipment who monitor telephone conversations to provide notice of monitoring does not substantially interfere with interstate communications and does not warrant preemption. States may enact local laws to protect privacy of telephone conversations.
—*Aeronautical Radio, Inc.*

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Ownership and Management, Integration of
Review Board denied reconsideration of diminished ownership integration credit in comparative b/c case where applicant's 12 words of record evidence concerning proposed managerial role of its 100% owner lacked a job description or even a job title.
—*Voce Intersectario Verdad America, Inc.*
MM Docket No. 83-765
Minority ownership interest in applicant without investment, held bona fide where contract provided minority owner with negative control over essential partnership and licensee functions. Integration credit denied for 95% owner where 5% owner assumed all financial responsibility and controlled applicant. Slight quantitative advantage for full-time integration off set by qualitative factors and part-time integration of majority ownership.
—*KIST Corp.*
BC Docket Nos. 81-863
(See also: Abeyance-*Chester Associates*)
(See also: Character Qualifications-*Marrow Enterprises, Inc.*)
(See also: Comparative Coverage Issue-*Makai B/cing, Inc.*)

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(See: Application for Review-*Alpha B/cing Corp.*)

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(See: Monitoring-*Aeronautical Radio, Inc.*)

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Application for review of order rejecting tariff revisions denied. Carrier must provide cost data to support proposed change in its private line rates and rate structure, as required by Section 61.38 of the Commission's Rules, 47 C.F.R. Sec. 61.38.
—*Alascom*

Rate, Structure
(See: Private Line Service-*Alascom*)

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(See: Common Carrier, Rates, Just and Reasonable Charges-*AT&T Earnings*)

Review Applications For
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Review Board, Certification
(See: Comparative Case, New Criteria-*Video 44*)

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(See: Cellular Communications System-*Westcom Products, Inc.*)

Satellite Communications, Authorized Carrier, Domestic
Changes in ownership structure of Satellite Business Systems (SBS) approved. Aetna Life and Casualty Company and International Business Machines Corp., two of the three equal partners in SBS, authorized to purchase third partner's (Communications Satellite Corp.) interest in SBS.
—*Satellite Business Systems*

Satellite Communications, International, Policy Re
(See: Common Carrier, International-*Pacific Telecommunications*)

Satellite Domestic Communications
(See: Satellite Communications, Authorized Carrier, Domestic-*Satellite Business Systems*)

Satellite Orbit
(See: Advisory Committee-*Reduced Orbital Spacing*)

Site Availability
Various references and inconsistencies in low power TV rules are corrected. Television translator applications will not be given a processing priority. Low power TV and TV translator applicants will now be required to certify that they have reasonable assurance of site availability and submit information on the person contacted in order to obtain this reasonable assurance.
—*Low Power TV*
MM Docket No. 83-1350

State Law
(See: CATV, Non Video Transmission Services-*Cox Cable Communications, Inc.*)

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(See: Common Carrier, International-*Pacific Telecommunications*)

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-*AT&T Co.*

Tariff, Economic and Financial Data
(See: Common Carrier, Rates, Just and Reasonable Charges-*AT&T Earnings*)

Tariff, Hearing Designated
(See: Common Carrier, Rates, Just and Reasonable Charges-*AT&T Earnings*)

Tariff, Investigation
(See: Common Carrier, Rates, Just and Reasonable Charges-*Western Union Telegraph Co.*)

Tariff, Just and Reasonable Charges
(See: Common Carrier, Rates, Just and Reasonable Charges-*AT&T Earnings*)

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(See: Site Availability-*Low Power TV*)

Time, Extension of
Commission allotted FM Channel 261A to Julian, California, and affirmed a staff denial of a one-day extension of time request. Movant failed to meet procedural requirement that request be filed seven days in advance of comment deadline and provided no evidence of an emergency which would have allowed waiver of seven day rule. Additionally, Commission drew a distinction between granting extension of time requests which generally occasion a delay in the decision making process, and accepting late-filed pleadings which allow the Commission to make a case-by-case determination of the significance of information supplied.
—*Amendment of Sec. 73.202(b)*
MM Docket No. 83-1323

Translator, Need for
(See: Site Availability-*Low Power TV*)

Monitoring
Privacy Right To

California service monitoring rule requiring customers with private terminal equipment who monitor telephone conversations to provide notice of monitoring does not substantially interfere with interstate communications and does not warrant preemption. States may enact local news to protect privacy of telephone conversations.
—*Aeronautical Radio, Inc.*

FCC 85-494

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Petition for Declaratory Ruling and Expedited Relief filed by Aeronautical Radio, Inc. and the Air Transport Association of America

MEMORANDUM OPINION AND ORDER

Adopted September 6, 1985; Released September 12, 1985

BY THE COMMISSION: COMMISSIONER RIVERA NOT PARTICIPATING.

1. Before the Commission is a petition for declaratory ruling and expedited relief filed by Aeronautical Radio, Inc. (ARINC) and Air Transport Association of America (ATAA)[1] requesting that this Commission find unlawful an order of the California Public Utilities Commission (CPUC) that regulates service monitoring practices or private businesses.[2] Comments were received

[1] ARINC states it is the communications company serving the air transport industry by providing a variety of communications services on a non-profit basis. ATAA states it is the trade association of the nation's certified carriers.

[2] Service or supervisory monitoring is the practice, used by employers of listening in on business conversations between employees and customers for business reasons such as training and quality control, to identify sources of customer complaints, and to help determine the most capable employees for promotion. Although the California order in question also regulates recording of

from the State of California (California), The Associated Telephone Answering Exchanges, Inc. (ATAE) and the North American Telecommunications Association (NATA). The petitioners have replied. For the reasons discussed below, the petition is denied.

Background

2. The investigation which led to adoption of CPUC's General Order 107-B (hereafter "the Order"), was initiated by a complaint filed by an employee of Western Airlines, Inc. (Western). The employee alleged that Western had conducted service or supervisory monitoring over privately-owned terminal equipment without first providing proper notice to the employee. In dismissing the complaint, CPUC cited its lack of authority over the business practices of subscribers of telephone services. It noted that the local telephone carrier had no physical control over the subscriber's privately owned equipment nor any duty to inspect, supervise or regulate service monitoring on privately owned terminal equipment. *CPUC Decision No. 93839* (December 15, 1981). Nevertheless, the CPUC instituted an investigation into the desirability of promulgating a rule "regulating monitoring of telephone conversations by customers . . . who own or otherwise provide their own terminal equipment." *CPUC Order Instituting Investigation-Rulemaking 103* (December 15, 1981). The CPUC proposed a rule it stated was intended to ensure privacy as it existed before the widespread use of independently-furnished terminal (PBX) equipment. The final rule was adopted on June 1, 1983. As amended by an order adopted October 19, 1983, it provides that:

> (a) A customer with his own terminal equipment and who monitors calls must provide notice of such practice through one of the CPUC's authorized methods for equipment provided by the telephone company (open transmitter or beep-tone); [3] and
>
> (b) Upon learning of monitoring or recording not in accordance with the CPUC regulation, the telephone company will notify the customer that unless the customer discontinues such practices, the company shall discontinue service.

---

telephone conversations, the petition addresses only the service monitoring aspects of the order. We do not here consider the recording aspects of the California order.

[3] In addition to the general rule requiring notice, the Commission adopted a rule requiring each telephone utility to file a tariff that provides that as a condition "of use of the telephone network" each customer must give notice of monitoring.

The CPUC order also provides that a customer disputing that he is in violation of the CPUC rules or desiring "special relief" from the rule "by reason of special hardship or impossibility of compliance" may file a formal complaint with the CPUC. Finally, the order provides that a telephone company "shall not, by taking action pursuant to this rule, be liable for any loss, damage, or injury, established or alleged, which may result or be claimed to result therefrom."

3. After the CPUC Order was adopted, a number of airlines and the ATAA brought suit in the United States District Court for the Northern District of California seeking a declaratory judgment that the Order is invalid and unenforceable. *Air Transport Association of America v. Public Utilities Commission of the State of California*, No. C-83-5627-AJZ (N.D. Cal. filed November 18, 1983). The plaintiffs also requested a permanent injunction enjoining the defendants from enforcing the Order "or any other order seeking to regulate the services of the airlines in excess of the CPUC's jurisdiction."

4. An *amicus curiae* memorandum was filed by this Commission in the District Court on September 5, 1984, asking the court not to address the substantive issues regarding regulation of service monitoring because the Order on its face appeared broad enough to affect matters within the regulatory authority of the FCC. Accordingly, an order staying proceedings in the District Court case was entered on September 10, 1984, pending a final decision by this Commission determining whether the CPUC regulation at issue is preempted by federal authority. The instant petition is brought pursuant to that order.

The Petition and Comments

5. ARINC and ATAA claim that the CPUC service monitoring rule may adversely affect both the internal communications operations of the air transport industry and its external communications with the traveling public. They maintain that it is essential to both operations that calls be monitored. As to the internal operations ARINC explains there is a central communications center near San Francisco, California which receives calls from domestic and international aircraft. Emergency communications which require direct pilot access to technical support in order to land aircraft safely are handled by the center through the public switched network. The parties claim monitoring of these

conversations is required by the FCC[4] and the Federal Aviation Administration requires that they be recorded.[5] ARINC and ATAA argue that the nature of these conversations prevents the express prior consent of all parties.

6. With regard to the traveling public, petitioners explain that there are regional or centralized reservation centers that provide an essential, integrated component of the airlines' interstate network, allowing automatic routing of calls from one center to another when the first is busy or closed. Calls are routed from the network at the point where the privately owned equipment connects to the network and are processed through "automatic call distribution" equipment, which automatically routes them to a reservation agent.[6] Petitioners maintain that airlines do not differentiate between calls which originate inside of California and those which originate outside of the state.

7. In order to ensure that its agents are providing high quality service to its customers, the airlines monitor a small percentage of incoming calls.[7] Petitioners report that the agents employed by the airlines are made aware of the practice of service monitoring at the time they are hired and are fully aware that any incoming call could be monitored by supervisory personnel.[8] They further state that service monitoring is confined to incoming calls directed to the airlines as a business entity and not to any individual, and occurs on the airlines' property after the call has left the telephone company facilities. Employees are forbidden from making personal calls over the system, and the random assignment of calls makes it virtually impossible for a caller to reach a specific agent. It is the petitioners' position that customers calling an airline, and not a particular person, do not have their privacy invaded by service monitoring. They maintain that customers are calling an airline, that the monitoring is being conducted by the airline itself and, therefore, the caller obviously

---

[4] *See* 47 C.F.R. § 87.75.

[5] 14 C.F.R. §§ 121.343, 121.711. These sections contain regulations requiring the recording and storing of radio communications between pilots and air carriers and all data received by the aircraft flight recorders.

[6] According to ARINC and ATAA, most telephone equipment used at airlines reservations centers is privately owned rather than leased from a telephone carrier.

[7] The petitioners report that the proportion of calls monitored by most airlines is less than 1% and in no case more than 2%.

[8] ATAE, the international trade association for the live telephone answering service industry, reports that its members monitor calls between operators and callers to ensure that operators are performing their duties in an acceptable manner. Calls may also be recorded, ATAE states, to ensure accuracy of the messages and to enable customers to monitor how their calls are being handled.

has no expectation that his conservation will not be heard by the airline. The petitioners conclude that service monitoring has no relationship to the privacy interest of either the customers who call the airline or the agents employed by the airline. Petitioners contend that CPUC rule: 1) impermissibly regulates interstate communications; 2) violates the FCC's primacy in authority over the terms and conditions governing interconnection of customer-provided equipment by restricting use of equipment that does not cause harm; [9] and 3) leads to an impossible situation of multi-state regulation.

8. In response, the CPUC explains that its Order followed a directive by the California Legislature, under Section 7905 of the Public Utilities Code, that telephone companies maintain records of any monitoring devices which they discover and determine whether those entities engaged in monitoring are ensuring the privacy of telephone conversations. The CPUC reasons that privacy can only be ensured by providing notice to both parties to a call that the call is being monitored, recorded or otherwise intercepted. The CPUC states that it has established an exception to the notice requirement for monitoring conducted by telephone companies for purposes of administration, supervision and maintenance, that an exception for airlines is not mandated by the California Penal Code (as is the exception for the telephone carriers), and that creation of such an exception would render meaningless the right of privacy the Order intends to protect. The CPUC further states that airlines are not precluded from using the public network; they are simply required, like all other subscribers, to give notice when this use is accompanied by monitoring.[10]

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[9] NATA is concerned that the designation of telephone carriers as enforcers of California's privacy policy creates opportunities for carrier discrimination against users of independently-supplied CPE and therefore undermines the Commission's long-established competitive policies. Furthermore, NATA states, even if the CPUC rule is lawful, California's privacy policy is totally at odds with the principle that "when a customer connects its own PBX, the telephone company's responsibility ends at the point of connection unless the connection causes harm to the system." Com Services, Inc. v. Murraysville Telephone Co., 87 F.C.C. 2d 664, 666 (1981), *citing* Third Report in Docket No. 19528, 67 F.C.C. 2d 1255, 1257 (1978); 47 C.F.R. § 68.108.

[10] The CPUC suggests two methods for the airlines to avoid interruption of service. First, the airlines could inform their employees that all incoming calls are subject to being monitored and then limit the monitoring to the employees' end of the call, excluding the caller's end; or second, they could provide an introductory recorded message to all incoming callers that their calls are subject to being monitored.

9. Furthermore, the CPUC argues that state restrictions on monitoring constitute a legitimate regulation of intrastate service and that the rules do not "substantially affect interstate communications." While it recognizes that the Federal Communications Commission has exclusive jurisdiction over the connection of terminal equipment to the interstate network, it maintains that use of this equipment to monitor intrastate communications is a matter of local concern and is properly left to state regulation. The CPUC contends that the right to interconnect terminal equipment to the public switched network does not preempt states from regulating intrastate monitoring. It denies that its Order conflicts with any decision of this Commission.

Discussion

10. Federal law preempts state law when 1) Congress has expressed a clear intent to preempt state law, 2) Congress has legislated comprehensively to occupy an entire field of regulations or 3) state law actually conflicts with federal law or stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[11] In the field of telecommunications, Congress has given this Commission broad and plenary authority over interstate communications by wire and radio. 47 U.S.C. §§ 151, 152(a).[12] However, Congress has specifically indicated that the states, if they wish, may enact local laws to protect the privacy of telephone conversations, so long as the minimum standards reflected in federal statutes are met.[13] *See* S. Rep. No. 1097, 90th Cong., 2d Sess. (1968) *reprinted* 1968 U.S. Code Cong. & Ad. News 211, 2181-2187; *State v. Hanley*, 605 P. 2d 1087 (1979), *on rehearing*, 608 P. 2d 104 (Mont. 1980); *People v. Conklin*, 522 P. 2d 1049, 1057 (Calif. 1974), *appeal dismissed*, 419 U.S. 1064 (1974). Moreover, it appears unlikely that the CPUC regulation will have a significant impact on customers' federal

[11] Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 2694 (1984); Silkwood v. Kerr-McGee Corp., 104 S. Ct. 615, 621 (1984); Hines v. Davidowitz, 312 U.S. 52 (1941).

[12] *See, e.g.*, National Association of Regulatory Utility Commissioners v. FCC, 746 F. 2d 1492, (D.C. Cir. 1984) (Interstate communications are totally entrusted to the FCC).

[13] We express no view herein concerning whether the business monitoring engaged in by the airline industry meets federal requirements regarding "private" surveillance of telephone conversations. *See* 18 U.S.C. §§ 2510-2520; *see generally* Briggs v. American Air Filter Co., Inc., 630 F. 2d 414 (5th Cir 1980) and cases cited therein concerning the "ordinary course of business exception" contained in the Omnibus Crime Control and Safe Streets Act.

interconnection rights.[14] Accordingly, and particularly in light of Congress' recognition of a legitimate state interest in this area, we conclude that federal preemption is not warranted.

Conclusion

11. Accordingly, IT IS ORDERED, That pursuant to Sections 1, 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and 154(j), § 554(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e), and Commission rule 1.2, 47 C.F.R. § 1.2, the petition for declaratory ruling filed by Aeronautical Radio, Inc. and the Air Transport Association of America IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico, *Secretary*

[14] Although the Commission has rules and decisions governing the right of customers to interconnect equipment that is privately beneficial and not publicly detrimental, the CPUC's actions do not preclude or restrict interconnection. There is no FCC registered terminal equipment that may not be connected as a result of the California order. Only if the equipment is used in a manner that California has found to be contrary to public policy would intrastate telephone service be disconnected. *See also* Diamond Intern. Corp. v. FCC, 627 F. 2d 489, 493 (D.C. Cir. 1980), (Commission decision to refrain from exercising jurisdiction upheld where there is no substantial effect on conduct or development of interstate communications.)

Private Line Service
Rate, Structure

Application for review of order rejecting tariff revisions denied. Carrier must provide cost data to support proposed change in its private line rates and rate structure, as required by Section 61.38 of the Commission's Rules, 47 C.F.R. Sec. 61.38.
—Alascom

FCC 85-346

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Alascom, Inc. Tariff F.C.C. No. 7 Private Line Service	Transmittal No. 244

MEMORANDUM OPINION AND ORDER ON REVIEW

BY THE COMMISSION:

1. In an Order released on June 18, 1984,[1] the Common Carrier Bureau rejected a proposed tariff filed by Alascom, Inc., under Transmittal No. 244 which would have changed the rates and rate structure of Alascom's voice grade private line service. The Bureau's Order stated that the proposed rates were not supported adequately by cost data required by Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. Alascom has filed an Application for Review of the *June 18 Order*.[2] For reasons discussed below, Alascom's Application for Review is denied.

[1] Alascom, Inc., Memorandum Opinion and Order, Mimeo No. 4832, released June 18, 1984 (*June 18 Order*).

[2] On August 30, 1984, General Communication, Inc. (GCI) filed an Informal Opposition to Alascom's Application. The GCI filing was untimely under Section 1.115(d) of our Rules, 47 C.F.R. § 1.115(d), and will not be considered in this Order.

I. BACKGROUND

2. Under Alascom's current private line tariff, jurisdictionally interstate channels between points within Alaska are priced according to a mileage sensitive rate structure which varies in three steps from $3.50 per mile for the first 250 miles to $2.80 per mile for each mile over 500 miles. For service between the continental United States (CONUS) and Alaska, customers may obtain either a satellite channel at a flat monthly rate of $2,700 or a terrestrial channel routed in part via Canada and terminating at the CONUS carrier's point of connection on the CONUS for a flat monthly rate of $2,530. In addition to the monthly rate, the intra-Alaska rate schedule applies for the channel link between a customer's location and a satellite gateway city, or to a specified terrestrial facility termination point within Alaska.

3. Alascom's proposed tariff would have changed considerably its current rates and rate structure for private line service. First, all flat rates for Alaska/CONUS transmissions would have been replaced by distance-based rates. Second, a "premium" per mile charge would have applied to customers who specified terrestrial routing for a given circuit. Third, Alascom proposed to revise its current distance-based rates, increasing them for short haul transmissions and decreasing them for long haul transmissions.[3] Fourth, areas of service would have been divided into "Type A" and "Type B" locations, the former corresponding to large urban areas and the latter to less populated areas. A monthly "channel termination" charge of $60 would have applied to channels terminating in Type A locations, and a charge of $180 to channels terminating in Type B locations.

4. The *June 18 Order* rejected Alascom's proposed private line tariff for a number of reasons: (1) lack of cost data required by Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, to support the substantial variation in rates among the different mileage bands; (2) lack of cost data to support the rates for

[3] The current and proposed rates are:

Mileage Bands	Current Rates	Proposed Regular	Proposed Premium
0 - 250	$3.50	$4.60	$8.05
251 - 500	3.15	1.50	2.00
501 - +	2.80	.65	1.15

premium service; (3) a failure to define adequately criteria for classifying locations as Type A or Type B; and (4) insufficient cost support for the termination charges for Type A and Type B locations. With regard to the final ground for rejection, Alascom ostensibly justified the costs associated with these changes through a linear regression analysis. This analysis, however, was premised on a questionable classification scheme, and alternative hypotheses were not tested.

5. Alascom contests the Bureau's rejection of its proposed tariff on a number of grounds. First, it argues that the cost support data supplied established a *prima facie* case precluding rejection, and that if the Bureau were dissatisfied with the data it should have investigated the cost support further. Alascom further contends that the Bureau's rejection of the Type A/Type B termination location classification scheme was premised on a misreading of Alascom's economic data. The Bureau's criticism of the regression analysis used to support the termination location classification, according to Alascom, stems from a "misconception about the way the process of [regression] modeling and testing necessarily works."[4] Alascom also states that the proposed premium rate classification is reasonable because terrestrial routing is a distinct service with unique advantages. Furthermore, it states that if this classification were allowed, Alascom would not, in fact, favor some customers by giving them terrestrial routing for which they did not pay. According to Alascom, its proposed premium rates for terrestrial private line channels are not unlawfully high, as evidenced by their failure to recover Alascom's costs, and few channels are affected. Finally, Alascom states "[t]he Bureau properly does not contest the overall distance-based cost differential for transmission charges . . . ."[5]

II. DISCUSSION

6. Alascom's contentions that its cost data established that its tariff was *prima facie* lawful and that the Bureau was required to request more information and conduct an investigation before rejecting its tariff are incorrect. In the *June 18 Order*, the Bureau found that Alascom's cost data provided no basis for Alascom's proposed premium service rates, distance-based rates, termination charges and stated termination costs. In light of such comprehensive deficiencies in the Section 61.38 data, the Bureau found,

[4] Alascom Application at 11 (footnote omitted).
[5] *Id.* at 13.

"little purpose would be served by an investigation."[6] This exercise of discretion is well within the Bureau's delegated authority to determine what type of showing is adequate under Section 61.38.[7] Because the data submitted by Alascom were patently incomplete, the Bureau's rejection of the Alascom tariff for failure to provide the information required by Section 61.38 was appropriate.

7. Alascom contends that the Bureau's review of its proposed termination charges was premised on a misperception. Alascom states that its figures demonstrate a "solid 2 1/2:1 to 3:1 relationship between the Type 'A' and Type 'B' channel termination investment and maintenance costs . . ."[8] and justify termination charges that are three times greater for Type B terminations than for Type A. Alascom contends that the Bureau focused on weighted average figures rather than on a composite figure for investment per termination for its transmission facilities. This misperception, according to Alascom, led the Bureau to question the three-to-one cost relationship between type A and B facilities, and the termination charges based thereon.[9]

8. Alascom has misread the Bureau Order and has overlooked one of the Bureau's central concerns. We are cognizant of the fact that Alascom's figures show investment per termination for Type B facilities to be three times greater than that for Type A facilities. The Bureau's concern, however, which we share, was that Alascom has not explained how it classifies locations as Type A or Type B. Absent clear selection criteria, the classification scheme is potentially unlawfully discriminatory. As the Bureau stated in its Order, Alascom "simply chose to designate switching centers and large earth stations as a particular category, stating that these facilities were 'expected' to exhibit lower unit costs."[10] This rationale is insufficient to justify the wide disparity in termination rates that would accompany the Type A/Type B classification scheme.

9. Alascom's assertion that the Bureau did not understand the process of modeling and testing in the regression analysis used to support its classification scheme similarly fails to warrant our

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[6] *June 18 Order* at para. 13.

[7] ITT World Communications Inc., Memorandum Opinion and Order, 70 FCC 2d 1316, 1328 (1978). *See also* Associated Press v. F.C.C., 448 F.2d 1095 (D.C. Cir. 1971) (construing former Section 61.33 of the Commission's Rules, the predecessor of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38).

[8] Alascom Application at 8.

[9] *Id.* at 7–9.

[10] *June 18 Order* at para. 10.

review of the *June 18 Order*. The regression studies purport to justify the Type A/Type B classification scheme by demonstrating "the high confidence levels at which the original hypothesis that unit circuit termination investments are lower at switching centers and major earth stations [Type A facilities] . . . than at small earth stations and terrestrial microwave repeater sites was supported by the mathematical analysis."[11] As the Bureau stated in its Order, the entire study is premised on the belief that the Type A/Type B classification scheme is valid, and fails to test any alternative hypotheses. The analysis is fatally flawed because "it essentially begins with its own conclusion."[12] For these reasons, we conclude that the Bureau's rejection of different channel termination charges for Type A and B termination locations was proper.

10. Alascom further contends that the Bureau rejected the premium rate structure for terrestrial routing because "[t]he Bureau seems to have inferred without a bit of evidence that Alascom will wrongly and deliberately use its discretion to the advantage of some customers by giving them more terrestrial routing than they have paid for."[13] In the *June 18 Order*, however, the Bureau stated that the premium service rate differential is potentially discriminatory because the tariff is ambiguous in terms of the type of routing customers could actually obtain from Alascom. Although Alascom argues that it would not manipulate the use of facilities and would determine the most efficient use of its network, it fails to demonstrate what tariff provisions would govern Alascom's choice in those instances where a customer does not request the premium terrestrial routing but Alascom assigns Trans-Canada routing and charges the non-premium rate. In addition, the costs for the use of the trans-Canadian routing are a fixed rate per mile. However, Alascom makes no attempt to support the proposed distance-sensitive rate levels for premium service with the non-distance-sensitive costs it incurs. The *June 18 Order* clearly established that the premium rate classification scheme must be supported by Section 61.38 cost data, and we agree with the Bureau's rejection of the scheme for lack of such data.

11. Alascom's other arguments are without merit. Its arguments that the proposed terrestrial rates do not cover costs and affect only 63 channels are irrelevant and unresponsive to our

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[11] Alascom Application at 4.
[12] *June 18 Order* at para. 10.
[13] Alascom Application at 14.

finding that the Section 61.38 data are inadequate. Finally, Alascom's assertion that the Bureau does not contest the cost differential between short- and long-haul rates is erroneous. The *June 18 Order* states that "[n]o cost data is given that would support the radical variation in rates for customer-specified terrestrial service, nor the extreme difference between rates for short-haul and longer distance channels."[14]

III. CONCLUSION; ORDERING CLAUSE

12. For the reasons discussed above, Alascom has failed to show why a review of the *June 18 Order* is warranted.

13. Accordingly, IT IS ORDERED that the Application for Review of *Alascom, Inc.*, Memorandum Opinion and Order, Mimeo No. 4832, released June 18, 1984, filed by Alascom, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

[14] *June 18 Order* at para. 6.

Common Carrier, Interconnection
Common Carrier, Microwave Radio

By Direction Letter seeking recommendations from Alaska Public Utilities Commission regarding an appropriate policy governing allocation of toll interconnect facilities in Alaska's Bush Communities. Action taken because not apparent sufficient economic base to warrant hearings on duplicate facilities at villages.
—*Alaska Public Utilities*

FCC 85-300

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Applications filed by Alascom, Inc. (Alascom) and United Utilities, Inc. (United), for authority to construct point-to-point terrestrial microwave radio system.

Alaska Public Utilities Commission
1100 MacKay Building
338 Denali Street
Anchorage, Alaska 99501

Adopted: June 7, 1985; Released: June 11, 1985

DEAR COMMISSIONERS:

The Federal Communications Commission has before it for consideration competing applications filed by Alascom, Inc. (Alascom) and by United Utilities, Inc. (United), for authority to construct point-to-point terrestrial microwave radio systems that will provide telephone service to seventeen rural "Bush" communities throughout the state of Alaska.[1] The applications are

[1] The seventeen villages are Akiachak, Akiak, Aniak, Atmautluk, Bethel, Chauthbaluk, Eek, Goodnews Bay, Kasigluk, Kwethluk, Napakiak, Napaskiak, Nunapitchuk, Oscarville, Platinum, Tuluksak and Tuntutuliak.

alleged to be mutually exclusive in that only one may be granted in any particular area because only one system in an area is believed to be economically viable.[2] Both carriers appear to be qualified to construct and operate the proposed facilities. Ordinarily, pursuant to our general practice, mutually exclusive point-to-point applications are designated for oral comparative hearings to determine which applicant is best qualified to provide service.[3]

We believe oral comparative hearings, which generally are time consuming and expensive, would be particularly inappropriate given the circumstances in this case. They impose substantial costs on the participants and would add to the already long delay in improving communications service to the Bush villages. Furthermore, granting sole ownership over a facility may deny residents of Bush areas important contributions that are unique to the unsuccessful applicant.[4] Because of these unfavorable factors associated with the traditional hearing process, we have withheld action on the applications in the hope that Alascom and United would reach an acceptable arrangement for providing telephone service to the Bush villages. Although discussions have taken place between the two applicants, which have led to formal agreements (apparently due to your assistance) to substitute the use of satellite earth station facilities for point-to-point microwave facilities to serve the villages of Sheldon Point, Twin Hills, Alakanuk, Togiak and Togiak Fisheries, Alascom and United apparently have not been able to resolve voluntarily their impasse on how point-to-point telecommunications services will be provided to the subject Bush communities, despite urgings by this Commission's staff.

As you are aware, we were confronted previously by a similar problem concerning applications filed by Alascom and local telephone exchange carriers for authority to construct satellite earth stations that would serve some of the Alaskan Bush communities with message telephone service. That impasse precipitated a series of administrative decisions, culminating in our adoption of a policy of joint-ownership of these facilities. Due to your assistance in enlisting the cooperation of Alascom and the local exchange carriers, what seemed an irreconcilable situation

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[2] Letter from United Utilities to Chief, Common Carrier Bureau, dated December 14, 1984.

[3] Alascom and United have each petitioned that the other's applications be denied. Their respective allegations are, on the whole, comparative in nature; *i.e.*, they argue petitioner's proposal and qualifications are superior.

[4] *See* Earth Stations (*Tentative Decision*), 92 F.C.C. 2d 736, 747 (1982).

now is near resolution. But, although resolution of the Bush earth station controversy is near, it has taken nearly 10 years and has placed a considerable drain on the resources of all concerned.

While adoption of a policy of joint-ownership of the Bush earth stations has been successful, we do not now have an adequate record from which to determine whether the same solution would be appropriate for the point-to-point microwave radio stations serving the Alaskan Bush. We note that the technologies and equipment in question are different. Operational differences, the amount of investment in question, the proposed locations of the facilities, the proposed use at a particular location, differences in the types of interconnections, and other factors could suggest that the same kind of joint ownership ordered after extensive proceedings in the Alaska Bush earth station controversy is not appropriate for point-to-point microwave facilities. On the other hand, however, major portions of the routes of the point-to-point systems proposed by Alascom and United are virtually identical. Apparently earth station and terrestrial facilities are fungible to a certain extent and both are part of one communications system. Thus, joint ownership may be the appropriate solution.

In responding to the staff's efforts to encourage a private settlement, Alascom suggests "that the Commission request the Alaska Public Utilities Commission to examine the circumstances of service to the Alaska Bush villages involved and to provide guidance to the Commission regarding the appropriate point of interconnection between the companies . . . ."[5] In reply, United States: "United would support a Commission request to the APUC to lend its good offices towards a resolution of this matter . . . ."[6]

The APUC was instrumental in finalizing the joint ownership arrangement between Alascom and United for earth station facilities. It is conversant with the capabilities of both carriers, and it has an intimate knowledge and understanding of the Bush telecommunications network and the problems of the Bush communities. Furthermore, it has proven itself to be not only highly interested in the development of telecommunications services to the Bush communities, but also an efficient and effective policy implementer. Accordingly, we once again call upon the APUC to use its good offices, this time to assist us in making a

[5] Letter from counsel for Alascom to Chief, Common Carrier Bureau, dated February 15, 1985.

[6] Letter from counsel for United to Chief, Common Carrier Bureau, dated March 6, 1985.

determination of how and to whom authorizations for the seventeen point-to-point microwave radio stations should be issued. We ask that it make it recommendations to us within 180 days of the date of this letter. We intend to accord substantial deference to its recommendations.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Application for Review
Political Broadcast, Discrimination
Political Broadcast, Rates, Lowest Unit Rate
Political Broadcast, Rules, Enforcement of

Alpha B/cing Corp. violated the lowest unit charge and nondiscrimination provisions of the Communications Act and the Commission's rules.
—*Alpha B/cing Corp.*

FCC 84-526

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Liability of

Alpha Broadcasting Corporation
Licensee of Radio Station WCRV
Washington, New Jersey

For Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 1984; Released: November 21, 1984

BY THE COMMISSION:

1. The Commission has before it an Application for Review filed June 25, 1984, by Alpha Broadcasting Corporation (hereinafter "Alpha").

2. On September 29, 1982, the Commission received a complaint which alleged that Alpha, the licensee of radio station WCRV, Washington, New Jersey, had violated Section 315(b) of the Communications Act of 1934, as amended (47 U.S.C. § 315(b)), and Section 73.1940(b) of the Commission's rules (47 C.F.R. § 73.1940(b)) [1] in that the licensee was overcharging legally

[1] Section 73.1940(b) inrelevant part, which essentially parallels the language contained in Section 315(b), states:

(b) *Charges for use of stations.* The charges, if any, made for the use of any broadcasting station by an person who is a legally qualified candidate for any

qualified candidates in their "uses" of the station's broadcast facilities. In addition, the complaint alleged that the licensee violated Section 73.1940(c) of the rules[2] because it had discriminated between candidates in its political advertising payment practices. Finally, the complainant asserted that the licensee violated Section 73.1940(d) of the rules because it had failed to maintain properly its political file.[3]

3. On January 19, 1984, the Bureau issued a Notice of Apparent Liability for Forfeiture (herinafter "NAL") of $5,000 for repeated violations of Section 315(b) and Sections 73.1940(b) and (c).[4] The Commission's review of the licensee's political file revealed that it had failed to charge legally qualified candidates for public office its lowest unit charge during the forty-five days preceding the June 1982 primary election and during the sixty days preceding the November 1981 and 1982 general elections. Furthermore, the record before the Commission indicated that Charles M. Lee, a legally qualified candidate for public office, was the only candidate required to pay by certified check for his political announcements during the November 1981 general election. This requirement was imposed even though Lee had purchased time from the licensee earlier (during the primary election) in 1981, while other candidates who had no prior credit record with the licensee did not have to pay by certified check.

4. In its response to the NAL, the licensee denied all of the foregoing allegations. The licensee was of the opinion that under the lowest unit charge provision of Section 315(b) of the Commu-

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public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—

(1) [d]uring the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period.

[2] Section 73.1940(c) of the Commission's rules states:

(c) *Discrimination between candidates.* In making time available to candidates for public office, no licensee shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any licensee make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to broadcast to the exclusion of other legally qualified candidate for the same public office.

[3] The Commission did not have sufficient information to find a violation of Section 73.1940(d), and accordingly, this allegation was not addressed in the Commission's January 19, 1984 NAL.

[4] A copy of the NAL is included as Attachment A.

nications Act, the prices charged to legally qualified candidates could vary depending on the volume of spots furnished for the same class of time. Furthermore, the licensee alleged that it was never informed of the "interpretation" of Section 315(b) that was contained in the Bureau's letter of inquiry dated November 25, 1982, and repeated in the NAL. The licensee asserted that the rule could only be changed by amending the Communications Act. Since Section 315(b) had not been recently amended, the licensee concluded that its interpretation and implementation of the rule were correct. Alpha further asserted that the Bureau had incorrectly calculated the overcharge figures because they were based on the maximum frequency discount offered on the station's *local rate card* rather than on the maximum frequency discount that was *actually* allowed to commercial advertisers. Also, the licensee asserted that agency commissions were not taken into account when calculating the overcharges. With regard to the discrimination allegation, Alpha stated that its actions were justified in light of the various threats, disturbances, and demands of the Lee for Freeholder Committee. Finally, Alpha asserted that it was unable to pay the assessed forfeiture because the station was not generating a profit.

5. On June 8, 1984 the Bureau issued a Memorandum Opinion and Order[5] which assessed a forfeiture of $5,000 against Alpha for its repeated violations of Section 315(b) and Sections 73.1940(b) and (c), and ordered Alpha to rebate overcharges totalling $3,191.48 to the affected candidates. In support of its action, the Bureau cited congressional and judicial precedents which established that candidates are entitled to benefit from all volume and frequency discounts offered to a licensee's commercial advertisers. S. Rep. No. 91-751, 91st Cong., 2d Sess. 6 (1970); *Hernstadt v. FCC*, 677 F.2d 893 (D.C. Cir. 1981). Furthermore, the Bureau found that the licensee could not be excused from liability because of an apparent misunderstanding of the proper interpretation of Section 315(b). *KIRO, Inc.*, 19 FCC 2d 641 (1969); *Evergreen Broadcasting Corp.*, 26 FCC 2d 453 (1970); *Kalamazoo Broadcasting Co.*, 24 FCC 2d 441 (1970). The Bureau pointed out that the Commission had previously informed all licensees of the proper application of Section 315(b) and had consistently found those licensees who failed to give candidates the benefit of frequency discounts to be in violation of Section 315(b). *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC

[5] A copy of the Memorandum Opinion and Order is included as Attachment B.

2d 510 (1972); *Harbenito Radio Corporation*, 58 FCC 2d 645 (B/c Bur. 1976); *Radio Station WGBR*, 58 FCC 2d 980 (B/c Bur. 1976). With regard to Alpha's assertion that the Bureau had miscalculated the overcharge figure, the Bureau found that it had properly calculated Alpha's lowest unit charges by basing its figures on those frequency discounts that were *offered* to commercial advertisers rather than those discounts actually sold. *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d at 531. In addition, the Bureau found that agency commissions were taken into account in calculating lowest unit charge.

6. With regard to Alpha's assertion that it was justified in requiring the Lee for Freeholder Committee to pay by certified check in the November 1981 general election, the Bureau found that Alpha failed to establish valid economic reasons for its action. The Bureau noted that Lee had previously purchased time from the station during the June 1981 primary election. Yet, other candidates who did not have credit records with the licensee were not required to pay by certified check. The Bureau found that the disparate treatment of Lee by Alpha appeared to be precipitated by a personal conflict, a result that Section 73.1940(c) was promulgated to avoid. *See Honorable Hildagardeis Boswell*, 49 FCC 2d 1374 (B/c Bur. 1974); *WANV, Inc.*, 50 FCC 2d 177 (1974). Finally the Bureau found that the assessed forfeiture should not be reduced because Alpha failed to submit any financial information pertaining to its parent corporation. The Bureau stated that when assessing the solvency of a broadcast licensee for purposes of reducing a forfeiture, the Commission examines the finances of the parent corporation, as well as its subsidiary, to determine how the forfeiture will financially affect the entire corporate position.

Discussion

Application for Review

7. Section 1.115(c) of the Commission's rules (47 C.F.R. § 1.115(c)) provides that no application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass. Facts not raised in the initial complaint may be presented to the designated authority in a Petition for Reconsideration. *See* Section 1.106 of the Commission's rules (47 C.F.R. § 1.106). In its Application for Review, Alpha has submitted new factual and legal evidence not

previously presented to the Bureau for its consideration. Accordingly, this new information is not properly before the Commission and will not be addressed herein.[6]

Violation of Section 73.1940(c)

8. In its Application for Review, Alpha asserts that it did not violate Section 73.1940(c) because it aired all of the advertising ordered and paid for by the Lee for Freeholder Committee, there was no actual damage suffered by candidate Lee, and there was no showing that the acts of Alpha evidenced an intent to discriminate. We disagree. The nondiscrimination provision of Section 73.1940(c) of the rules applies to *any* discrimination between candidates resulting from a licensee's practices, and requires that no preference be given to one candidate to the prejudice or disadvantage of another. Therefore, contrary to Alpha's assertion, the prohibitions of this section are not limited to discrimination in the airing of political spots. Consequently, we find that where a licensee, without valid economic justification, requires only one candidate to prepay his political spots by certified check, this practice serves to disadvantage that candidate in that he must expend additional time and money in conjunction with his political advertising campaign.[7]

9. With regard to Alpha's assertion that it did not intend to discriminate against Lee, the record before us clearly indicates that Alpha intended to treat Lee differently with respect to its political advertising payment requirements. *See* Attachment B, p. 6. In a November 16, 1982 reply to complainant's allegations, Alpha stated, "[W]e may indeed have required a certified check from Mr. Gebauer; that, however, was justified at that time in view of his consistent harassment of us which made me conclude that he may stop [payment on] his check. As to [whether] we were actually paid by certified check I have no recollection, at that time I simply wanted to be rid of a consistently annoying pest." In view of the foregoing, we find no merit to Alpha's assertion

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[6] Attachment C contains a list of the documents submitted by Alpha in its Application for Review.

[7] In this connection, Robert Rush, the campaign finance manager for Charles Lee stated in an October 23, 1981 letter to Alpha, "I can assure you that this policy of requiring certified checks, which is of course causing extra expense to the campaign, and an annoyance to me in general as a businessman in the community, is not creating good will on your part."

that it did not intend to discriminate.

10. Alpha further asserts that the discrimination allegation should be dismissed because of the complainant's failure to seek a prompt remedy in this matter. In this regard, Alpha points out that the alleged violation occurred during the November 1981 general election and the complaint pertaining to this issue was not filed until almost a year later. There is no specific statute of limitation for the filing of complaints under Section 73.1940(c) of the Commission's rules. Therefore, a standard of reasonableness is applicable here. We note that under Section 73.1940(d) of the Commission's rules a licensee is required to retain its political file for a period of two years. Therefore, we find that any discrimination complaint filed within two years from the date of the alleged violation would clearly fall within the zone of reasonableness.[8] Further, the record reveals that the discrimination allegation was precipitated by Alpha's continuing violations of the lowest unit charge provision of Section 315(b), which occurred during the 1981 general election period and the 1982 primary and general election period. Under these circumstances, we find that the allegation concerning Section 73.1940(c) was timely filed.

11. Finally, Alpha asserts that in view of the various threatening, harrassing, and disruptive activities engaged in by the Lee For Freeholder Committee that it was justified in requiring the payment by certified check. In this connection, we agree with the Bureau's conclusion that the record reveals "the conflicts between the licensee and the Lee For Freeholder Committee stem from the licensee's misinterpretation and misapplication of Section 315(b) of the Communications Act." *See* Attachment B, p. 6. Alpha has presented no new arguments which would lead to a contrary conclusion.[9]

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[8] Of course we do not preclude, in appropriate circumstances, consideration of complaints filed more than two years after the alleged violation.

[9] If anything, Alpha has provided documentation which indicates that it violated Section 315(b). In response to a Bureau inquiry of October 25, 1982, Alpha enclosed, among other things, a copy of a September 2, 1981, memorandum from George Vajda, President, Alpha Broadcasting Corporation, to WCRV's station manager, which spelled out the station's practices for the sale of political time:

> This, for practical purposes means that even if his commercial is in drive time, the politician is to be given the lowest ROS rate, applicable to the number of spots he buys. If he buys 1 one minute spot, he gets the lowest rate for the frequency. If he buys 52 thirty-second spot[s], he gets the lowest thirty-second rate for a 52 buy and so on.

This memo clearly demonstrates a misunderstanding of Alpha's lowest unit charge obligation. It indicates that in order to receive the frequency discount for 52 spots, the candidate must

12. In its Application for Review, for the first time in this proceeding, Alpha admits that "there were certain discrepancies and errors" in its billing practices for political candidates. However, Alpha states that these billing errors were a result of the acts of its former station manager and unintentional mistakes made by "station personnel and/or data processing."[10] Alpha also claims that the Bureau miscalculated the overcharge figures. According to Alpha, the correct amounts are reflected in the station's billing registers, which it now submits for Commission consideration. Alpha indicates that it will make refunds to thirteen candidates based on the information contained in the billing registers.

13. A licensee will not be held liable for violations of the Commission's rules resulting from an employee who acts outside his scope of employment. *Frank S. Kovas, Jr.*, 13 FCC 2d 293 (1968). In this regard, Alpha alleges that its former station manager was "printing rates that were unauthorized, then extending rates off that card or free time to his friends and organizations he belonged to while not pursuing the business interests of his employer." Although these activities may, in fact, fall outside the scope of the station manager's employment duties, Alpha has only made bare allegations of such misconduct. Alpha has failed to provide any documentation which would substantiate these alleged abuses. Furthermore, even if Alpha had properly documented the station manager's alleged misconduct, Alpha has not demonstrated that these activities were directly responsible for its violations of Section 315(b) and Section 73.1940(b). Accordingly, we find no merit to Alpha's assertion that its former station manager's actions were responsible for its failure to charge properly political candidates. Furthermore, with respect to Alpha's assertions that its improper charging practices were due to the unintentional mistakes of its employees, it is well established

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buy 52 spots. The Commission on a number of occasions spelled out what lowest unit charge means—all candidates must be given all discounts based on volume or frequency, regardless of how few programs or spots the candidate buys.

[10] We note that throughout this proceeding Alpha has consistently denied any violations of the lowest unit charge provision of Section 315(b) of the Act and § 73.1940(b) of the rules. In its Application for Review, Alpha admits for the first time that it has overcharged political candidates. Alpha maintains, however, that it was not responsible for these overcharges because they were caused by the unauthorized activities of its former station manager. Since the conduct of the station manager was already introduced into the record by Alpha prior to filing its Application for Review (see Alpha's reply of February 25, 1983), this argument will be addressed herein.

that licensees are responsible for the acts of their employees. *Eleven Ten Broadcasting Corp.*, 32 FCC 706 (1962); *Gaffney Broadcasting, Inc.*, 23 FCC 2d 912 (1970). Therefore, any mistakes made by Alpha's employees with regard to overcharging political candidates would not relieve Alpha from its responsibility to comply with our rules.[11]

14. Alpha has submitted its billing registers to document its contention that the Bureau improperly calculated the overcharges it made to the affected candidates. These billing registers represent new factual evidence not previously presented to the Commission, and consequently, they will not be considered in this proceeding. *See* Attachment C. We also note that the Bureau based its overcharge calculations on Alpha's political file, which must reflect all charges made to political candidates for broadcast time. *See* Section 73.1940(d) of the Commission's rules. Therefore, should the billing registers contain information on rates charged to political candidates that vary from its political file, then such omissions could constitute violations of Section 73.1940(d) of the Commission's rules.[12] We therefore find, based on the information contained in Alpha's political files for 1981 and 1982, that the Bureau's rebate figures for overcharges to political candidates are calculated correctly. Furthermore, Alpha has made no showing that the Bureau's overcharge figures, which were based on the information contained in Alpha's political files, were incorrectly calculated. Accordingly, Alpha must rebate those overcharge figures which are specified in Attachment D (total—$3191.48). To the extent that Alpha has already made rebates to the affected candidates, it still must refund the difference between the amount

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[11] Alpha also asserts that "data processing" contributed to its improper billing practices. It is unclear from Alpha's pleading whether those individuals who work for data processing are considered employees of the station or independent contractors. Nevertheless, under either classification Alpha is responsible for their mistakes. *Sundial Broadcasting Corporation*, 30 FCC 2d 949 (1971); *Wagnevoord Broadcasting Co.*, 35 FCC 2d 361 (1972).

[12] Assuming the billing registers contain additional information on rates charged to candidates, aside from potentially violating the rules, such information should have been submitted at the time the Commission requested WCRV's political file and rate cards. The Bureau sent three letters to Alpha (October 7, 1982, and March 10 and 25, 1983) requesting that it provide information on any rates charged to candidates during 1981 and 1982 that were not reflected in WCRV's rate cards. *No such information was provided.*

it has rebated and the amount of overcharges calculated by the Bureau.

Findings

15. In view of the foregoing, we affirm the Bureau's ruling. Therefore, pursuant to Section 1.115(g) of the Commission's rules and regulations, the Application for Review IS DENIED. Furthermore, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED that Alpha Broadcasting Corporation, licensee of radio station WCRV, Washington, New Jersey, Forfeit to the United States that sum of five thousand dollars ($5,000) for its repeated violations of (47 U.S.C. § 315(b), (47 C.F.R. §§ 73.1940(b) and (c).

16. IT IS FURTHER ORDERED that the licensee advise the Commission within twenty (20) days of the release of this document as to what actions it has taken to rebate the overcharges specified in Attachment D.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

*Appendixes and Attachments may be seen in FCC's Dockets Branch, 1919 M Street, N.W., Washington, D.C.

Time, Extension of

Commission allotted FM Channel 261A to Julian, California, and affirmed a staff denial of a one-day extension of time request. Movant failed to meet procedural requirement that request be filed seven days in advance of comment deadline and provided no evidence of an emergency which would have allowed waiver of seven day rule. Additionally, Commission drew a distinction between granting extension of time requests which generally occasion a delay in the decision making process, and accepting late-filed pleadings which allow the Commission to make a case-by-case determination of the significance of information supplied.
—*Amendment of Sec. 73.202(b)*
MM Docket No. 83-1323

FCC 85-115

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Julian, California)	MM Docket No. 83-1323 RM-4585

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 12, 1985; Released: March 15, 1985

BY THE COMMISSION:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making* ("*Notice*"), 48 Fed. Reg. 56610, published December 22, 1983, requesting comments on the proposed allotment of Channel 261A to Julian, California, as that community's first local FM channel. The *Notice* was issued in response to a petition from Andrew G. Smith ("petitioner"). The petitioner and Harold A. Jahnke ("Jahnke") filed comments and reply comments

supporting the allocation and affirming an interest in activating the channel.[1] Opposition comments were filed by Imperial Valley Broadcasters, Inc. ("Imperial"), licensee of Station KGBA-FM, Holtville, California.[2] In addition, the Commission has before it an Application for Review, filed by Imperial, concerning the staff's denial of its request for a one-day extension of time in which to file its comments.

2. Imperial's Application for Review seeks reversal of the staff's denial of its extension of time request[3] and the acceptance of its comments. Imperial contends that motions for extension of time are generally granted, particularly where no party would be harmed by the delay, the Commission's processes are not unduly disrupted, and the information contained in the comments are of importance to the proceeding. It also contends that there is "no real difference" between granting an extension of time in which to file comments and accepting late-filed comments. Therefore, lacking an extension, Imperial seeks acceptance of its untimely comments stating that they were filed only one day late, that the petitioner was notified by telephone that the comments were being submitted and that no party or the Commission would be adversely affected by acceptance of its pleading. It notes that the parties to this proceeding were served with copies of its comments and responded to the issues raised therein.

3. Section 1.46 of the Commission's rules governs motions for extension of time. It states that it is the policy of the Commission that extension requests will not be granted routinely. Under this rule extension requests must be filed at least seven days prior to the expiration of the comment period. It does, however, allow that in "emergency situations," the Commission would consider late-filed motions for brief extensions of time related to the duration

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[1] The comments and reply comments of Jahnke are procedurally defective since they were not timely filed. Nevertheless we have reviewed both comments and find that they provide us with no information which is not already before the Commission in timely filed comments. Thus we have not accepted these comments for consideration herein.

[2] Imperial's late-filed comments were accompanied by a request that they be accepted. It contends that the allotment at Julian does not provide the required distance separation. Imperial measured the distance from El Centro, a community for which its station has been given dual city ID authority. The mileage calculation should have been based on the distance between Station KGBA-FM's transmitter site and Julian's reference coordinates. See Section 73.208 of the Rules. Thus, the comments provide us with no information of decisional significance and have not been accepted. In light of this decision, the reply comments of petitioner need not be discussed as they relate solely to Imperial's comments.

[3] *Order*, adopted February 10, 1984, Mimeo No. 2688.

of the emergency and that we would also consider motions for acceptance of pleadings filed after the filing deadline.

4. Imperial's request for an extension of time does not comply with the criteria set forth in our rules. Imperial made no showing of exceptional circumstances merely stating that it had received information which would interest the Commission. It also failed to meet any of the procedural requirements set forth in the rules. It did not comply with the seven day filing requirement and presented us with no indication of any emergency situation which would have convinced us to waive this rule.

5. Imperial also contends that no party would have been harmed by the grant of its requested extension. We disagree. Any other interested party would be operating under the assumption that the original deadline would stand since no extension request had been filed seven days prior to the comment deadline. If we had granted Imperial's last-minute request, these parties would have been deprived of the extra time granted to Imperial since they would have already filed. Imperial further argues that there is no difference between accepting late-filed comments and the grant of an extension of time. Generally extensions of time occasion a delay in the decision making process. They are therefore granted only when the Commission has been provided with sufficient reason to believe that the information to be provided is of such significance that the public would in fact benefit from such a delay. As a matter of fairness, an extension of time, if properly filed and granted, allows all parties the use of the additional response time. The acceptance of late-filed pleadings, on the other hand, permits the Commission to make a case-by-case determination as to whether the information supplied is of such significance as to warrant the grant of an individual waiver of the filing deadline. In addition, other parties may raise objections arguing that such late-filed pleadings not be considered. Accordingly we affirm the *Order* denying an extension of time and hold that the late filed comments of Imperial are unacceptable.

6. With respect to the allotment of Channel 261A to Julian, California, we believe the public interest would be served by providing the opportunity for a first local FM service. The channel can be allocated in compliance with the Commission's minimum distance separation and other technical requirements. Mexican concurrence has been obtained as Julian is located within 320 kilometers (199 miles) of the U.S.-Mexican border. Accordingly, pursuant to the authority contained in sections (i), 5(c)(1),

303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, IT IS ORDERED, That effective April 22, 1985, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, to read as follows:

City	*Channel No.*
Julian, California	261A

7. IT IS FURTHER ORDERED, That the Application for Review of the *Order* denying the request for extension of time filed by Imperial Valley Broadcasters, Inc. IS DENIED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Application, Acceptance

Applicant's amendments as tendered for filing which proposed major changes resulting from loss of antenna sites, did not meet the criteria set forth in the Commission's June 23, 1982 *Public Notice* which announced a 90-day application amendment period for television translator and low power television applications, and the amendments are therefore dismissed. —*American Christian TV System, Inc.*

FCC 84-365

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
AMERICAN CHRISTIAN TELEVISION SYSTEM, INC.	File Nos. BPTTL-810116V5 BPTTL-810213IS BPTTL-810213I0
For Construction Permit for New Power Television Stations in Nashville, Tennessee, Texarkana, Texas and Joplin, Missouri	

MEMORANDUM OPINION AND ORDER

Adopted: July 26, 1984; Released: August 10, 1984

BY THE COMMISSION:

1. The Commission has under consideration an Application for Review of Action Taken Under Delegated Authority filed October 21, 1983, by American Christian Television System, Inc. ("ACTS"). ACTS seeks review of the action of the Mass Media Bureau denying a Petition for Reconsideration and Acceptance of Amendments *Nunc Pro Tunc* and returning amendments to the above-captioned applications as unacceptable for filing. The action

was taken by letter from the Chief, Low Power Television Branch dated September 16, 1983.

2. ACTS filed its applications for low power television stations to serve Nashville, Tennessee on January 16, 1981, and Texarkana, Texas and Joplin, Missouri on February 13, 1981. ACTS then submitted amendments to its applications on September 20 and 21, 1982, which specified new transmitter sites. ACTS states in its Petition for Reconsideration that these amendments were filed in response to the *Public Notice*, FCC 82-297, 51 RR 2d 1275 (released June 23, 1982), which provided a 90-day application amendment period for low power television and television translator applications after the adoption of the low power television rules; and additionally that it was required to file its amendments by Section 1.65 of the Commission's Rules because its applications had undergone decisionally significant changes in financial and technical information, most particularly the loss of its previously specified antenna sites. However, on February 24, 1983, the staff returned ACTS's amendments on the ground that the applicant failed to provide a showing that the pending proposed facilities conflicted with existing broadcast stations, as required by the Commission's June 23, 1982, *Public Notice.*

3. In its Petition for Reconsideration ACTS pointed out that on September 20 and 21, 1982, it tendered the amendments to the applications to specify new antenna sites and that filing anything less than a full technical showing concerning its new sites, such as reporting for example, simply the loss of the sites without specifying new sites and supplying the accompanying technical data, would be contrary to Commission rules. As outlined by the staff in the letter of September 16, 1983, denying the Petition for Reconsideration, the portion of ACTS's amendments which reported loss of site theoretically was acceptable pursuant to Section 1.65 of the Commission's Rules; however, the portion of ACTS's amendments which specified new transmitter sites was not acceptable for filing during the 90-day amendment period, and the amendments were properly returned.

4. The *Public Notice* provided for the filing of two groups of amendments during the 90-day amendment period which ended on September 21, 1982. The first group of amendments was for "technical and nontechnical information required to render the application complete and accurate." *Public Notice, supra.* As detailed in the *Low Power Television Report and Order, (LPTV Report and Order)* 51 RR 2d 476 (1982), this included such

information as "appropriate antennas, with model numbers, a correct polar diagram, including the total polar plot, accurate overall height above ground of the antenna and altitude of ground above mean sea level figures and accurate coordinates for the site proposed . . . . " *LPTV Report and Order*, at footnote 49.

5. The second group was for "amendments filed to bring the application into compliance with the technical and engineering standards of the rules." *Public Notice*, *supra*. All such amendments were subject to an adequate showing by the applicant that application involved an engineering conflict with an existing broadcast station that precluded grant of the proposal without the tendered amendment. In addition, for such amendments filed to avoid interference to existing broadcast stations, the major change provisions of Section 73.3572 of the Commission's Rules were waived where an adequate showing was made that the proposed increase in service area would be less than 50% of the proposed service area currently on file.

6. Amendments to change transmitter site due to loss of the previously proposed site were not the types of amendments which came within either of the two groups of amendments which were acceptable for filing during the 90-day amendment period.[1] The site change proposed by ACTS was a major amendment, not required in order to alleviate interference with an existing broacast station.

7. The *LPTV Report and Order* established a three tiered system for processing applications. Under the terms of this tiered process, ACTS's applications for Nashville, Tennessee and Texarkana, Texas were for Tier III locations (being the 30th and 59th largest television markets, respectively); and its application for Joplin, Missouri, was for a Tier II location (the 113th largest television market). The *LPTV Report and Order* also continued the freeze on all new and major change applications for all Tier II and III locations. Thus, applicants in Tier II and III locations were precluded from filing major change amendments under the freeze unless they came within the provisions of the 90-day amendment period. Although minor amendments to change site by Tier II and Tier III applicants were acceptable for filing at

[1] ACTS claims in a letter that a staff member orally advised its counsel that amendments to specify new transmitter sites due to site loss would be acceptable during the 90-day amendment period. Counsel's interpretation does not agree with the provisions of the *Public Notice*, nor does it differentiate between major and minor amendments. In any event, the *Public Notice* set forth stringent and limited criteria for acceptance of amendments.

any time, major amendments to change site would be acceptable only after the freeze is lifted or in response to a cut-off list.

8. In attempting to file restricted amendments to its applications (to change sites due to loss of sites) during the 90-day amendment period, ACTS's amendments were found to be unacceptable for filing. Since the amendments were not considered, the applications remain on file as originally tendered.[2]

9. Accordingly, IT IS ORDERED, that pursuant to Section 1.115 of the Commission's Rules, the application for review filed by American Christian Television System, Inc. IS DENIED.

10. IT IS FURTHER ORDERED That the Mass Media Bureau send a copy of this *Memorandum Opinion and Order* by Certified Mail-Return Receipt Requested, to the applicant named herein.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[2] If applicant cannot prosecute its applications at the originally proposed sites, it must, within thirty (30) days of the release of this order, submit minor amendments proposing new sites or request dismissal of its applications. Further, in the event of dismissal the applicant may refile new applications as appropriate in response to a cut-off list or after the lifting of the filing freeze.

Subsidiary Company

Memorandum Opinion and Order adopted concerning regulatory treatment of expenses incurred by Western Electric to develop customer premises equipment prior to operation of separate subsidiary.
—*AT&T Co.*

FCC 85-331

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
American Telephone and Telegraph Co.	ENF 83-9
Regulatory Treatment of Preoperational Expense Incurred by Western Electric Co. Relating to the Development of Customer Premises Equipment.	

MEMORANDUM OPINION AND ORDER

Adopted: June 21, 1985; Released: July 3, 1985

BY THE COMMISSION:

I. INTRODUCTION

1. We have before us a statement filed by the American Telephone and Telegraph Company (AT&T) addressing the issue of whether preoperational expenses funded by Western Electric[1] to develop customer premises equipment (CPE) between May 2, 1980 and December 31, 1982 should be reimbursed in whole or in part to ratepayers. The statement was filed in response to the *CPE Capitalization Order*[2] in which the Commission directed AT&T to file a statement as to whether such a reimbursement is

[1] As of January 1, 1984, named AT&T Technologies, Inc.
[2] CPE Capitalization Order, 91 FCC 2d 578 (1982), *reconsideration*, 95 FCC 2d 167 (1983), *further reconsideration*, FCC 84-224 (released May 23, 1984).

warranted.[3] In that Order we required AT&T to reimburse the ratepayers of the Bell Operating Companies (BOCs)[4] and AT&T Long Lines for preoperational expenses which they paid for through rates for basic communications services. We deferred the decision as to whether Western Electric funded development expenses should be reimbursed to ratepayers, pending the receipt of additional information. We conclude that reimbursement of these expenses to ratepayers is not required.

II. BACKGROUND

2. In the *Second Computer Inquiry (Computer II)*, the Commission concluded that the provision of enhanced services and CPE is not subject to regulation under Title II of the Communications Act.[5] As a consequence "new" CPE[6] could not be offered under tariff after January 1, 1983. Because of AT&T's then unique status in the provision of telecommunications equipment and services, the Commission required AT&T to participate in the enhanced services and CPE markets only through a separate subsidiary. The relationship between the subsidiary and AT&T is governed by Section 64.702 of the Commission's Rules.[7]

3. In directing AT&T to form a separate subsidiary, we required it to obtain Commission approval as to the subsidiary's capitalization. On reconsideration, the Commission acknowledged the concern of several parties that it would not be in a position "... to examine capitalization plans adequately without information on the expenses incurred by AT&T in the interim period before structural separation occurs."[8] Therefore, the Commission stated that it would hold AT&T accountable for expenses of setting up the separate subsidiary and the costs of developing the

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[3] *Id.* at 606.

[4] The divestiture of AT&T took place on January 1, 1984. United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983).

[5] Second Computer Inquiry (Computer II), 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 5 (1981), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[6] New CPE is that CPE which was not subject to the jurisdictional separations and settlements process as of January 1, 1983, and therefore, excluded CPE on customer's premises and in telephone company inventory as of January 1, 1983. *See Further Reconsideration*, 88 FCC 2d at 525-26.

[7] By Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 85-56 (released February 22, 1985) in Docket 85-26, the Commission initiated a proceeding to reexamine the requirement of a CPE separate subsidiary for AT&T.

[8] Reconsideration, 84 FCC 2d at 85.

CPE and enhanced services to be offered after separation.[9] In November, 1981, AT&T filed a capitalization plan for the enhanced services to be provided by a separate subsidiary, American Bell, Inc., now ATTIS.[10] In July, 1982, AT&T filed a supplement to the capitalization plan of ATTIS to enable it to offer new CPE beginning January 1, 1983. In its CPE capitalization plan AT&T provided the amount of preoperational expenses funded by the BOCs, AT&T Long Lines, Western Electric, and AT&T General Departments.

4. In approving the CPE capitalization plan, the Commission directed AT&T to reimburse ratepayers for those preoperational expenses for development and formation which were incurred by the BOCs and AT&T Long Lines and funded through basic service revenues.[11] The Commission also defined the methodology by which the reimbursement was to be made.[12]

5. With respect to the development expenses incurred by Western Electric, AT&T stated that Western incurred approximately $495 million of CPE development expenses from May, 1980, to December 31, 1982.[13] AT&T did not, however, propose to reimburse ratepayers for any portion of Western-funded expenses.[14] AT&T offered four reasons why a ratepayer reimbursement is inappropriate.[15] First, AT&T contended that, as a "develop-and-then-produce-and-sell" business, Western, and ATTIS, (after January 1, 1983) will finance current research and development related to future products through equipment sales after January 1, 1983. Therefore, AT&T concluded, there is no

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[9] *Id.*

[10] On June 10, 1982, the Commission approved AT&T's enhanced services capitalization plan with modifications. Enhanced Services Capitalization Order, 90 FCC 2d 404.

[11] CPE Capitalization Order, 91 FCC 2d 578 (1982)

[12] AT&T has reimbursed the BOCs and AT&T Long Lines for the preoperational expenses they incurred. The BOCs booked the amounts applicable to them, less the amounts they claimed were disallowed by state ratemaking authorities, in account 174, "Other Deferred Credits." AT&T Long Lines was required to enter the entire amount applicable to the interstate jurisdiction into its own account 174. CPE Further Reconsideration Order, FCC 84-224 (released May 23, 1984), at para 12.

[13] AT&T initially estimated these costs to be $500 million, and that figure was used in the pleadings filed herein. The actual amount expended by Western Electric in the form of payments to Bell Telephone Laboratories was $423,500,000. An additional $71,500,000 was directly incurred by Western to fund CPE development costs. These latter expenses would have also been charged on a current basis against the CPE product line. AT&T terms all these funds Specific Design and Development (SD&D) Expenses, the fruits of which are intended to benefit Western Electric manufacturing operations.

[14] CPE Capitalization Order, 91 FCC 2d at 604.

[15] *Id.* at 605-606.

reason to reimburse any of these expenses because ATTIS will simply assume Western's ongoing CPE development business. Second, AT&T argued that Western's prices would have been the same even if CPE development expenses had not been incurred. Third, AT&T argued that CPE development costs should be treated differently from enhanced services development costs funded by Western. AT&T argued that the enhanced service (AIS/NET 1000) was a service of new vintage, making it improper for regulated customers to pay for costs associated with an unregulated offering. AT&T distinguished CPE from the enhanced services development and formation expenses because CPE is not of new vintage and because those development costs were borne by CPE users in the past and will be borne by them in the future. Thus, concluded AT&T, basic services ratepayers have not borne the cost of new CPE development. Finally, AT&T contended that even assuming, *arguendo*, that the development costs were initially paid by ratepayers, they would no longer pay for the undepreciated portion of development costs once the embedded base was transferred out of regulated services.

6. In the *CPE Capitalization Order*, we found AT&T's arguments with respect to its proposal not to reimburse ratepayers for any portion of Western funded CPE development expenses to be unpersuasive.[16] We noted that the BOCs may have paid Western too high a price for their CPE by virtue of the possible inclusion of development expenses in CPE products sold to the BOCs, and that these overpayments might have been passed on to ratepayers. However, the Commission could not be certain that ratepayers actually paid the Western CPE development expenses by the inclusion of these expenses in prices charged for CPE during the period, or that ratepayers would be otherwise entitled to a reimbursement. Concluding that there were insufficient facts upon which to make such a determination, we required AT&T to demonstrate further that CPE development expenses funded by Western Electric should not be reimbursed in whole or in part to ratepayers.[17]

III. AT&T'S STATEMENT

7. AT&T filed its statement on December 21, 1982 and interested parties filed comments with respect to the statement.[18]

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[16] *Id.*

[17] *Id.*

[18] Comments were filed by the Public Utilities Commission of California (California), United Telephone System, Inc. (UTS), Tandy Corporation (Tandy) and

AT&T asserts that ratepayers have not borne any of the development expenses in question and that no other rationale exists to support reimbursement of those expenses. In support of its position, AT&T presents five basic arguments.

8. First, AT&T discusses the propriety of Western's accounting treatment for CPE development expenses and the relationship of that treatment to its pricing of products. It points out that the practice of charging CPE development costs to expense as incurred is required by generally accepted accounting principles (Financial Accounting Standards Board-Accounting Standard No. 2) and is consistent with procedures which were well documented and found acceptable in Docket 19129. AT&T Statement at 7–11. It argues, however, that this accounting treatment does not reflect its pricing policy. It states that Western's 1980 to 1982 CPE prices should be viewed as recovering past expenditures to develop the CPE sold during the period. AT&T Statement at 12. In support of its position, AT&T points out that in recent years regulatory commissions have increasingly emphasized the necessity of assuring that previously incurred CPE development costs are covered by current CPE prices and that some states have required an affirmative showing that prices were, in fact, high enough to recover past development costs. *Id.* at 14–15.

9. In this regard, AT&T also states that not all of the CPE development costs incurred in the 1980 to 1982 period were for products to be sold after 1982. It states that over $50 million of those costs were incurred to correct problems applicable to embedded CPE and to develop new and improved CPE offered by the BOCs during the 1980 to 1982 period. It states that current CPE customers clearly benefited from these expenditures. *Id.* at 18–20.

10. Second, AT&T argues that, even if it were concluded that some of the $495 million development expenses were included within the price of CPE products sold to the BOCs, Western's prices did not exceed a reasonable level. *Id.* at 21. In support of this argument, AT&T states that, because there has been healthy

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Rochester Telephone Corporation (Rochester). Reply Comments were filed by the Ad Hoc Telecommunications Users Committee (AHTUC). On November 16, 1983, a Petition for Intervention and Expeditious Resolution was filed with the Commission by various parties, including the Florida Consumers Federation, Illinois Public Action Council, Citizens Action Coalition of Indiana, Inc. Massachusetts Fair Share, New York City Action Network, Washington Fair Share for Citizens Action and Wisconsin Action Coalition. We deny the request for leave to intervene. The petition was filed long after substantive comments were due, and no reason was provided to justify the delay.

competition in the CPE market, prices have been held down to reasonable levels. Therefore, AT&T concludes, ratepayers have not been injured by Western Electric's prices, regardless of what expenses were in those prices. *Id.* at 23. In addition, AT&T argues that, because of that competition, it is no longer necessary to view Western's CPE prices in terms of a traditional regulatory test of Western's overall pricing, such as was contemplated in Docket 19129[19] *Id.* at 24. To further support its argument, AT&T asserts that Western's earnings were reasonable even under a traditional regulatory analysis because, on an average basis for the years 1980 through 1982, "Western's estimated weighted average return on equity of its Bell Business, adjusted to exclude $500 million of CPE development expense, was 17.0 percent." *Id.* at 27. AT&T points out that this was below the 17.4 percent return on equity which the Commission determined as AT&T's cost of equity in the last rate of return proceeding.[20]

11. Third, AT&T contends that, even if it is assumed that Western's CPE prices from May 1980 to December 1982 improperly included the $495 million of CPE development expenses and that this caused Western's earnings to be excessive, it does not follow that the Bell System's rates for regulated services were unreasonably high. It claims, instead, that the rates of return achieved by the Bell carriers were far below just and reasonable levels throughout the 1980 to 1982 period. It contends that the resultant earnings shortfalls far outweigh any effect that could possibly be attributed to the supposed inclusion of CPE development expenses in Western's prices. *Id.* at 29.

12. AT&T also states that, even assuming for ratemaking purposes that Western Electric CPE development expense immediately found their way into the inter- and intrastate rate bases every month during the period from May 1980 through December 1982 and these amounts were then subject to depreciation on the basis of the actual prescribed lives for the relevant categories of plant added during the period in question, the total estimated depreciation accruals during 1980 to 1982 would have amounted to $60.9 million. *Id.* at 29-30.[21]

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[19] Phase II Final Decision and Order, AT&T Charges for Interstate Telephone Service, 64 FCC 2d 1 (1977).

[20] AT&T Petition for Modification of Prescribed Rate of Return, 86 FCC 2d 257 (1981).

[21] AT&T states that the depreciation accruals for 1980, 1981, and 1982 would have been $3.8 million, $18.6 million and $38.5 million, respectively. It states that these depreciation accruals are based on a weighted average of Commission-prescribed depreciation rates for the types of CPE added in the applicable period. AT&T Statement at 30.

13. AT&T also states that even if the achieved annual rates of return for Western were adjusted downward to reflect full disallowance of the rate base and depreciation accruals assumed to have resulted from Western CPE development expense incurred between 1980 and 1982, the rates of return were still below the 12.75 percent which was authorized by the Commission. *Id.* at 30-31. In addition, AT&T asserts that if, in the aggregate, the BOCs actual rates of return on their intrastate rate bases for 1980 to 1982 are adjusted upward to reflect full disallowances for any assumed effect of the intrastate portion of the $495 million of CPE development expenses, the average achieved intrastate rate of return was below that of the weighted average rates of return approved by state regulatory commissions. *Id.* at 31-32.

14. Fourth, AT&T argues that, even assuming that some part of Western's development expenses for CPE was improperly "included" in the prices of CPE sold to the BOCs and subsequently capitalized on the books of the BOCs, these costs will largely be recovered upon transfer of the embedded CPE. AT&T maintains that once imbedded CPE is transferred out of regulated rate basaes, ratepayers will no longer fund any CPE development expenses. It asserts further that if the transfer value is set at net book value, the undepreciated portion of those expenses would no longer be included in revenue requirements.

15. Fifth, AT&T argues that a ratepayer reimbursement is inappropriate even if CPE prices were too high. AT&T argues that any refund is more appropriately the subject of a ratemaking proceeding, which would be consistent with the procedures outlined in Docket 19129. *Id.* at 35. AT&T concludes that Docket 19129 did not stand for the proposition that a reimbursement would be conducted if Western's earnings were excessive, but rather there would only be a possible disallowance in a future rate proceeding. AT&T asserts that the Commission is powerless to require reimbursement of earnings which are judged, in retrospect, to have been too high, just as AT&T may not recover past earnings shortfalls. *Id.* at 38. AT&T concludes that any ratepayer reimbursement in these circumstances would be confiscatory. In any event, AT&T urges the Commission to reevaluate the business risks Western encountered during the 1980 to 1982 time period, which AT&T believes were different from those which Western experienced when Docket 19129 was decided in 1977.

IV. COMMENTS OF INTERESTED PARTIES

16. Tandy is concerned that competition in the CPE market may be hampered if there is not ratepayer reimbursement. It asserts that ATTIS is obtaining the benefit of an undeserved windfall if Western absorbs the CPE development expenses. Tandy Comments at 5. Tandy asserts that Docket 19129, ratemaking principles, and adherence to acceptable accounting standards are irrelevant to this proceeding. Rather, the only question is whether ATTIS should pay for Western's development expenses.

17. Tandy argues that AT&T contradicts itself by stating that development expenditures are expenses in the year in which they were incurred but at the same time viewing current prices as recovering past development expenses. *Id.* at 8. Tandy disputes AT&T's theory regarding recovery of current development expenses in the sales of future products. Rather, Tandy argues that recovery of current expenses must be evaluated on the basis of current income. *Id.* at 10. Tandy disputes AT&T's assertion that the CPE market was competitive at the time Western expenditures were expensed since the majority of the market continued to belong to AT&T. *Id.* at 13. Tandy also argues that it is improper for AT&T to exclude 1980 through 1982 developmental expenses that benefitted then-current ratepayers unless it adds to its development expenses amounts expended prior to 1980 that only were associated with products introduced after 1982. *Id.* at 20. Tandy argues that the entire $495 million in expenses should be borne by ATTIS to prevent serious distortions in the CPE market. *Id.* at 22. Tandy thus concludes that the entire $495 million should be reimbursed to ratepayers. *Id.* at 25-26.

18. California points out that, because CPE is being depreciated at an accelerated rate due to competition in the CPE marketplace, it is possible that all 1980 through 1982 expenses would be fully depreciated by the time CPE is transferred out of the regulated rate base.[22] California Comments at 3. California concludes that because there is no reasonabale rationale for excluding Western-funded expenses from a reimbursement, ratepayers should be reimbursed for these expenses. California also argues that Western should be required to reimburse ratepayers for right-to-use

[22] As is demonstrated in paras. 24-25, *infra*, there is no basis for California's concern in this regard. Plant subject to the alleged overcharge was provided under tariff for only a small portion of the depreciation period.

fees paid by the BOCs for the right-to-use software and related documentation. *Id.* at 4.

19. Neither UTS nor Rochester expresses an opinion as to whether Western-funded expenses should be reimbursed. Rather, they argue only that any reimbursement should be flowed through to independent telephone companies via the jurisdictional separations and settlements process.[23]

20. AHTUC argues that AT&T should be required to prepare a detailed analysis of the costs Western funded which benefitted ATTIS.[24] AHTUC states that accounting principles and Docket 19129 are irrelevant to the instant proceeding. Rather, it states, because ratepayers should fund only those expenses which are necessary to provide regulated services, shareholders should bear these development expenses and not ratepayers, regardless of whether allowed rates of return were earned. AHTUC disputes AT&T's assertion that Western's prices were influenced by competition in veiw of Western's dominant supplier relationship with the BOCs. AHTUC concludes that, due to the tremendous lag time in developing new products, none of Western's development expenses, were involved, should have been borne by regulated operations.

21. In its reply AT&T disputes Tandy's position that a ratepayer reimbursement is required if its current income exceeded its current costs in the years in which Western-funded expenditures were expensed. AT&T states that Tandy has not demonstrated that Western's prices exceeded reasonable levels, nor have the Bell operating companies earned excessive rates of return. AT&T also disputes Tandy's position that the entire $495 million is subject to reimbursement, pointing out that the embedded CPE transfer to ATTIS would eliminate any development expenses from the BOCs' rate bases. AT&T states that it is improper to require a ratepayer reimbursement for Western-funded expenses because such action would require it to reflect both past and current CPE development costs, which is an unfair burden placed upon it as a competitor. Reply at 13. In summary, AT&T disputes that ratepayers have paid charges which are

[23] In view of our decision herein, we need not address whether independent telephone companies should share in any reimbursement.

[24] AT&T filed a motion to strike AHTUC's Reply Comments, alleging that it is in reality an untimely filed response to the initial statement filed by AT&T on December 21, 1983. We find that no party has been prejudiced by our consideration of AHTUC's reply comments since we have also considered AT&T's responsive argument contained in its motion to strike. Therefore, AT&T's motion to strike is denied.

unjust or unreasonable. Reply at 15. AT&T disagrees with California's claim that CPE prices recover current development expense. It also states that the right-to-use fees to which California refers include *all* Western right-to-use fees, including those not related to CPE.

V. DISCUSSION

A. General

22. A major goal of our decision in *Computer II* was to ensure that ratepayers for basic communications services do not bear the costs associated with providing unregulated products and services. One aspect of implementing this goal was our requirement that AT&T identify all formation and development expenses attributable to unregulated CPE and enhanced service operations prior to the time its *Computer II* subsidiary was formed.[25] In holding AT&T accountable for these costs, we intended that ratepayers be reimbursed for any such costs which they had borne. Thus, in the *CPE Capitalization Order*, we required AT&T to reimburse ratepayers for costs incurred by the BOCs and AT&T Long Lines.[26] In the *Enhanced Services Capitalization Order*,[27] Western Electric reimbursed AT&T Long Lines and the BOCs for Western-funded enhanced services development costs. These expenses were in right-to-use fees charged to Long Lines and the BOCs for software related to central office switching equipment. Western reimbursed this amount to Long Lines and the BOCs by reducing the right-to-use fees charged them for central office switching equipment. In reimbursing these costs, AT&T reasoned that such development costs were related to a category of service never before offered by the Bell System—an entirely new undertaking, having no parallel in previous development efforts. AT&T stated that, in such circumstances, current ratepayers have not been receiving the benefit of previously incurred development expenses.[28] In the *Cellular Capitalization Order*,[29] AT&T reimbursed the BOCs for payments made by them under the license contract and for the costs incurred directly by the BOCs in cellular planning activities. However, we did not

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[25] Reconsideration, 88 FCC 2d at 537.

[26] CPE Capitalization Order, 91 FCC 2d at 598-604.

[27] 90 FCC 2d 404 (1982), *recon granted in part and denied in part*, 91 FCC 2d 578 (1982), *further recon denied*, FCC 83-424 (released September 20, 1983).

[28] AT&T Statement at 17-18.

[29] American Telephone and Telegraph Co., FCC 83÷126 (released April 15, 1983), *recon. denied*, 97 FCC 2d 32 (1984).

require AT&T to reimburse Western's development expenses for cellular switching systems. We noted that our decision did not prejudice this proceeding, dealing with CPE development expenses, because the expenses for cellular switching systems related to a regulated service. *Id.* at para. 24.

23. In contrast to the above three proceedings, however, we now address the treatment of expenses incurred by the nonregulated entity for its ongoing CPE business. These expenses were not charged directly to ratepayers, and in fact might have been incurred in the absence of the Commission's *Computer II* order. Also, in those earlier proceedings the regulated entities had in place accounting systems which afforded evidence that costs had been borne by the ratepayers. In this proceeding, we may not merely assume that the ratepayers bare Western's expenses, as there is no direct matching of the expenses and carrier rates. Accordingly, the issue is whether the CPE development costs incurred by Western were *indirectly* borne by the ratepayers and, if so, whether reimbursement is required. We did not have sufficient information in the *CPE Capitalization Order* to resolve this matter. Thus, we found it necessary to obtain additional data as to how Western priced its CPE and whether the CPE development expenses were included in the prices which the BOCs paid for Western CPE or in rates paid by ratepayers.[30] AT&T has provided additional evidence in this regard, and other parties have filed comments thereon. To analyze the issue we must identify the time period with which we are concerned, and the amount of CPE development costs in issue. To this end, we will consider Western's prices and return levels during the period in question as the most reasonable indicator of whether the ratepayers bore the development costs.[31]

B. The Applicable Time Period and Amount in Issue

24. Approximately $495 million was expended by Western to fund development projects at Bell Telephone Laboratories (BTL) in the period May 2, 1980 to December 31, 1982. The Commis-

[30] CPE Capitalization Order, 91 FCC 2d at 606.

[31] Certain parties argued that we should not concern ourselves with Western's prices or the regulatory approach which we adopted in Docket 19129. Tandy argues, for example, that we should simply have all CPE development expenses recorded on the ATTIS books of account and "removed from regulated carrier books." Tandy Comments at 11. We considered such an approach in the Enhanced Services Capitalization Order, and rejected it. 90 FCC 2d at 426-7. There is no new argument before us which gives rise to a change in our position in this regard.

sion's inquiry is concerned with CPE development expenses incurred only during this period, which begins on the release date of the *Final Decision* and ends on the last date on which CPE could be offered under tariff. The Commission concluded that this was a reasonable and readily auditable time period, especially when viewed in light of other alternatives that involve enormous accounting efforts to reconstruct how such expenses should be allocated. The Commission also determined that there was no reason for AT&T to utilize a different time period for reporting development expenses incurred by Western Electric, Long Lines and the BOCs.[32]

25. Within this 32 month period the amount of development costs potentially reimbursable to ratepayers is substantially less than the $495 million originally suggested. To the extent that the development expenses in question were passed on to the BOCs, they could only be reflected in equipment prices charged by Western Electric. Thus, any costs borne by ratepayers would have arisen in two ways: depreciation expenses on the increased equipment costs of the BOCs and a return on the increased rate base during the period 1980 to 1983.[33] With respect to depreciation, AT&T calculates that if all CPE development expenses had been included in prices, approximately $60.9 million in depreciation expense would have been incurred on the capitalized CPE development costs from 1980 to 1982. AT&T Comments at 30. Our calculations show that approximately $116.3 million in depreciation expense would potentially have been incurred on the capitalized CPE from 1980 to 1983. AT&T did not calculate the rate base effect. However, our calculations indicate that the return on the CPE rate base associated with the development expenses would approximate $117.1 million for the period.[34] Thus, the amount in issue is not the entire $495 million, but approximately $233.4 million because any undepreciated development costs would have been transferred back to ATTIS

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[32] CPE Capitalization Order, 91 FCC 2d at 596-597.

[33] The time period for calculating the amount of potentially reimbursable costs includes 1983, because embedded CPE was still in the rate base that year. However, as noted above, no new CPE was added to the rate base in 1983.

[34] The $117.1 million return on rate base was computed by the simple arithmetic calculation of developing for 1980, 1981 and 1982, a rate base consisting of the cumulative CPE development expenses, less a depreciation reserve. It was assumed that each year's CPE expenses were capitalized evenly through the year. For 1983, the cumulative rate base at January 1 was kept in place until year end, and then reduced to zero on December 31, 1983. A rate of return of 12.75% was applied to the average net rate base for each year; these returns added to 1$17.1 million.

at net book value.[35]

26. It is not sufficient simply to conclude that, because Western incurred additional development expenses during this period, a refund is necessary. First, we would have to find that Western included the $495 million development costs in its CPE prices during this period. Second, even if the costs were included in the CPE prices, we have no evidence that all the CPE subject to such price increases was purchased by the BOCs and put into service during the period. Some of the CPE may have remained in Western's inventory or been purchased by third parties in arms-length transactions. Third, with respect to any costs which could be traced through to the BOCs, we will not order reimbursement without evidence that they (and AT&T) made rate adjustments to their customers based on the CPE price increases. Accordingly, consistent with the concerns expressed in the *CPE Capitalization Order*, we looked at Western's prices and earnings for the applicable period to see if any of the conditions described are supported by the evidence.

C. Western's Prices

27. In the *CPE Capitalization Order* we referenced Docket 19129, in which we directed Western to price products sold to the BOCs on the basis of the same rate of return we allow regulated entities to earn.[36] We notes that CPE development expenses were included in Western's costs that made up its theoretical revenue requirement to achieve that rate of return. We accordingly postulated that if those development expenses had not been included in Western's prices the BOCs would have paid less for the CPE. Thus, it appeared to us that without those development costs, Western may have earned in excess of the allowable rate of return.[37] If this were the case, the ratepayers would have overpaid by virtue of inflated rate base and increased depreciation expense.

28. As previously stated, at the time of the *CPE Capitalization Order* there were insufficient facts on the record to conclude whether such a reimbursement was warranted. We have now reviewed the record, as supplemented, including information regarding Western Electric's CPE development expenses, its return on investment and its price increases during the pertinent period. We conclude that there is no information to support a

[35] Thus, the concern of California that the CE development expenses would be paid for by ratepayers in the form of depreciation charges before the equipment was returned to ATTIS is not substantiated.

[36] CPE Capitalization Order, 91 FCC 2d at 604.

[37] *Id.* at 605.

finding that the CPE development expenses incurred by Western Electric for the period 1980 to 1982 were paid for by ratepayers.

29. First, we consider data regarding Western Electric's price increases during the period 1980 to 1982. The data reveal that those increases were less than those of other standard price increase indices during the same period:

AVERAGE ANNUAL CHANGE 1980-1982 [38]

Western Electric Overall Average	7.5 percent
Western Electric Customer Premises Product Average	8.0 percent
Consumer Price Index	10.0 percent
Electrical Components Accessories	9.1 percent
Electrical Machinery Equipment	9.0 percent
Telephone Plant Index	8.9 percent
GNP Deflator	8.2 percent
Producers Price Index	8.0 percent

30. The comparison illustrates that the increases in Western Electric prices were, in a generally recognized period of high inflation, less than those of other standard price indices. Moreover, the price increase of 8 percent for CPE products translates into $464 million.[39] To assume that the $495 million in development expenses at issue herein were passed on through price increases would involve the corresponding assumption that prices would have decreased had there been no CPE development costs. This is not realistic, given the inflationary pressures of the period. Thus, it is logical to conclude that Western did not pass on all the development costs through increased prices.

31. In addition, data regarding its return on average net investment indicates that Western's return for its total Bell business declined each year from 1980 to 1982 (14.5 percent in 1980; 14.3 percent in 1981; and 7.3 percent in 1982), averaging 12.0 percent during the period. Also, its return on average net investment for its total company business for all products declined each year during the same period (14.3 percent in 1980;

[38] Consumer Price Index from *Statistical Abstract of the United States*, 1984; Telephone Plant Index and Western Electric Averages provided by AT&T; GPN Deflator, Electrical Machinery, and Electrical Components, Accessories Indices from Department of Commerce Bureau of Labor Statistics.

[39] Report on Operating Results, Western Electric Company prepared for the NARUC-FCC Telephone Staff Subcommittee on Manufacturing and Service Affiliates, Table 1.

13.9 percent in 1982; and 7.1 percent in 1982). In addition, Western's return for its Bell business for CPE declined each year from 1980 to 1982; 11.5 percent in 1980; 10.6 percent in 1981; and 2.4 percent in 1982.[40]

32. Even if it were assumed, *arguendo*, that the $495 million of CPE development costs were not incurred by Western and that those dollars were, after taxes, included in net income,[41] the return on total Bell business averaged 13.6 percent during the period 1980 to 1982. The return on total company business for all of Western's products under this assumption averaged 13.37 percent during the same period. In fact, the returns for 1982 were below the authorized return of 12.75 percent.[42] Thus, Western Electric's return on net investment was not unreasonable in the period during which it incurred the CPE development expenses, nor would it have been unreasonable had the expense not been incurred, especially viewed in the context of divestiture.

33. Consideration must also be given to the fact that, even it it were assumed that Western improperly included the $95 million in its prices during that period, Western's average return on equity during the period, without these expenses, would still be below the return on equity authorized by the Commission: 17.9 percent in 1980, 17.3 percent in 1981, and 16.0 percent in 1982, for an average of 17.0 percent.[43]

34. Western Electric CPE development expenses for 1980 were $79,145,000; for 1981 the amount was $164,175,000, and for 1982, the amount was $255,566,000. Clearly, Western was substantially

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[40] Report on Operating Results, Western Electric Company prepared for the NARUC-FCC Telephone Staff Subcommittee on Manufacturing and Service Affiliates. The 1982 percentage for CPE reflects our adjustment for Western's "facility utilization plan" reductions (expenses for plant closings). This adjustment was included by AT&T in the 1982 figures for total Bell business and total company business.

[41] In assuming the Western Electric CPE development expenses were not incurred during 1980 to 1982, those dollars for each year, after an adjustment for taxes, were added to the net income for the same year. The return on average net investment was then caluculated.

[42] The Commission recognizes that Docket 19129 refers to a five year average (1978-1982) for judging the reasonableness of Western's prices. However, in the instant case, the relevant period is May 2, 1980 to December 31, 1982. There is no issue here as to Western's costs prior to May 1980, and in the period following December 1982 Western sold CPE to ATTIS, not the BOCs. The five-year average would be applicable in a rate proceeding considering the possibility of a disallowance for determining revenue requirements. It is not, however, the period that the Commission found proper to assess whether preoperational expenses should be reimbursed. CPE Capitalization Order, 91 FCC 2d at 596-597.

[43] AT&T Statement at 27-8.

increasing its SD&D efforts during this period. However, as we have noted above, the average price increase for CPE sold by Western during this period was less than that of other standard price indices. Moreover, during that same period Western's average annual return on investment for its total Bell business was less than its authorized interstate rate of return, declining each of those years. Given the facts, we cannot conclude that the BOCs paid too high a price for the CPE they purchased from Western or that current CPE development expenses were included in developing those prices. Concluding, as we do, that Western's prices to the BOCs were not excessive during this period, we find no basis for requiring reimbursement of a possible "overcharge" to ratepayers. The evidence does not support a conclusion that the substantial increases in CPE development expenses were included in the price of CPE sold during this period.

D. Right-To-Use-Fees

35. California's argument with respect to right-to-use fees does not demonstrate that any reimbursement is required. First, as AT&T points out in its Reply, California appears to discuss right-to-use fees in general, not those which might be related only to CPE development. Moreover, the right-to-use fees to which California refers are not the CPE development expenses to which we made reference in para. 105 of the *Reconsideration Order*.[44] Rather, California discusses right-to-use fees paid by the BOCs for existing software enhancements. Such fees are paid to compensate Western for software which is being used by the BOCs at the time the payment is made. There is no equitable basis upon which we could simply conclude that all such expenses should be reimbursed to ratepayers, as the ratepayers clearly received a current benefit from the payments.

VI. CONCLUSION

36. In this proceeding, we have dealt with the difficult problem of whether ratepayers indirectly bore CPE development costs incurred by Western Electric during 1980-1982, and, if so, whether they are due reimbursement. We have noted that this issue differs significantly from the reimbursement issues discussed in other orders relating to *Computer II* preoperational

[44] Reconsideration, 84 FCC 2d at 85. California appears to acknowledge this fact when it urges us to "open an inquiry" on such reimbursement. California Comments at 4.

costs. Western incurred the expenses at issue herein as part of a business activity which predated the *Computer II* decision. In those other *Computer II* decisions, the expenses were incurred by the regulated AT&T unit and were incurred only in response to our Computer II decisions. The ratepayers, who directly bore those costs, did not receive any current benefit from AT&T's expenses. In contrast, it was the BOCs who may have been directly affected by Western's expenses for CPE development; that impact would have been reflected in the prices the BOCs paid for CPE. Thus, we have focused in this proceeding on Western prices and returns.

37. The Commission has examined the record in this proceeding and has concluded that ratepayers did not pay any excessive payments to AT&T or the BOCs and are, therefore, not entitled to a refund for the Western Electric-funded CPE development expenses incurred between May 2, 1980, and December 31, 1982. There has been no showing and is no basis to find that Western-funded CPE development expenses during the period 1980 to 1982 were passed through in the prices of CPE sold to the BOCs during that period. In fact, it appears that Western's CPE price increases were moderate, Western's return on net investment declined, and its returns on equity were below AT&T's authorized return. This is so even though its CPE development expenses increased significantly during this period.

38. Because the record does not demonstrate that the CPE development expenses were not passed on in the prices of CPE sold to the BOCs during this period, there is no inflated rate base and depreciation expense. Therefore, there is no basis upon which a refund could be ordered in this proceeding.

39. Accordingly, IT IS ORDERED That the motion to strike filed by AT&T IS DENIED.

40. IT IS FURTHER ORDERED That the "Petition for Intervention and Expeditious Resolution" filed in Florida Consumer Federation *et al.*, on Nov. 16, 1983, IS DENIED.

41. IT IS FURTHER ORDERED That, this proceeding, ENF 83-9, IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Common Carrier, Rates, Just and Reasonable Charges
Common Carrier, Revenue Inquiry
Refund
Tariff, Hearing Designated
Tariff, Just and Reasonable Charges
Tariff, Economic and Financial Data

Commission determined that revenues received during 1978 violated FCC rate of return prescription order. Restitution ordered through reduction in future revenue requirement. Hearing instituted to insure that tariff filings that implement Commission's decision are in compliance with Commission's order and Communications Act.
—*AT&T Earnings*
CC Docket No. 79-187

FCC 84-567

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AT&T Earnings on Interstate and Foreign Services During 1978	CC Docket No. 79-187

DECISION

Adopted: November 21, 1984; Released: December 11, 1984

BY THE COMMISSION:

1. This proceeding was initiated as a result of information that indicated that tariffs incorporating compensation to local exchange carriers, interexchange carriers, and AT&T, would result in an earned rate of return for 1978 that would exceed the level authorized by the Commission.[1] At issue is whether the author-

[1] During 1978 AT&T filed monthly reports of interstate earnings that showed earnings ratios in excess of those that had been prescribed in Docket No. 20376, 57 FCC 2d 960 (1976). On December 20, 1978, the General Services Administration wrote to the Acting Chief of the Common Carriere Bureau with respect to AT&T's interstate earnings. On July 20, 1979, the National Citizens

ized rate of return for 1978 was exceeded, and if so, the remedial action that the Commission should take. We conclude that the level of interstate revenues that was received by AT&T and the Bell System Companies (hereinafter collectively referred to as "AT&T", unless the context indicates otherwise) during 1978 exceeded the authorized level by $101,000,000. We also establish a remedy by providing for reductions to prospective rates. In a forthcoming order, we will address the 1978 compensation that was received by non-AT&T/BOC carriers that was derived from interstate tariffs that were filed by AT&T.[2]

I. BACKGROUND

2. On January 19, 1976, the Commission voted to prescribe 9.5 percent as the rate of return for AT&T's interstate and foreign services. The Commission also stated that earnings equivalent to an additional 0.5 percent return on AT&T's interstate rate base would be allowed as an incentive for increased productivity and efficiency. A written decision to this effect was released on February 5, 1976,[3] that stated that the Commission would "not require any downward adjustment of AT&T's overall interstate rates provided its overall rate of return does not exceed 10 percent." AT&T filed tariff revisions on January 29, 1976 that were represented as having been designed to produce the prescribed 9.5 percent rate of return. The Commission suspended the revised rates for one day and subjected those rates to an accounting order.

3. With the increased rates in effect for only part of the year, AT&T reported an overall interstate rate of return of 9.25 percent for 1976. During 1977, AT&T's measurement of its earned rate of return increased to 9.59 percent. AT&T's Interstate Monthly Reports ("IMR 1") for the first nine months of 1978 showed a cumulative annual rate of return of 10.42 percent. This prompted the Common Carrier Bureau to initiate an internal review of AT&T's earnings. On December 20, 1978, the Acting Chief of the Common Carrier Bureau formally requested information from AT&T.[4] In response to the Bureau Chief's letter, AT&T stated

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Committee for Broadcasting, the Consumer Federation of America, and the Missouri Public Interest Research Group filed a "Petition for Enforcement of Accounting Order" which raised questions concerning AT&T's 1978 interstate earnings. Our action in this proceeding also addresses that petition.

[2] *See* paras. 17, 19, and 25, *infra.*

[3] *AT&T Rate of Return*, Docket No. 20376, 57 FCC 2d 960, 973 (1976).

[4] Letter to William R. Stump, American Telephone and Telegraph Company, from the Acting Chief, Common Carrier Bureau, December 20, 1979.

that its 1978 rate of return was 10.02 percent when calculated in accordance with the accounting changes concerning plant under construction that had been adopted in Phase II of Docket No. 19129.[5] It also stated that changes in economic conditions since the 1976 prescription justified an increased earnings level.[6]

4. AT&T's IMR 1 dated January 22, 1979 for calendar year 1978 showed a 10.22 percent rate of return on AT&T's interstate and foreign services.[7] The Acting Chief of the Common Carrier Bureau subsequently asked AT&T to explain the difference between the 10.02 percent figure cited in its letter of January 19, 1979 and the 10.22 percent figure shown on the IMR 1 which was dated January 22, 1979.[8] AT&T stated that the 10.02 percent figure for 1978 had been calculated in accordance with accounting rules for interest during construction that actually were not scheduled to become effective until January 1, 1979. AT&T further stated that it had used this measure of rate of return because it appeared to be a better indicator of future earnings levels than the unadjusted figure due to the fact that those accounting changes would tend to lower the measurement of the earned rate of return somewhat in future years.[9]

5. On September 18, 1979, the Commission adopted a Notice of Inquiry in this proceeding to examine the policy and earnings measurement issues that had arisen from AT&T's 1978 interstate operations. We requested comments on five issues: (1) Is review of AT&T's earnings on a calendar year basis appropriate in determining whether AT&T has complied with a rate of return

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[5] *Phase II Final Decision and Order in Docket No. 19129*, 64 FCC 2d 1 (1977). *See Memorandum Opinion and Order In the Matter of American Telephone and Telegraph Co.*, 72 FCC 2d 1 (1979). At the time of the Bureau Chief's letter, AT&T had a petition before the Commission that subsequently was approved at a public meeting on December 21, 1978. The effect of granting AT&T's request was to increase the measurement of AT&T's earned rate of return to 10.22 percent. A more extensive discussion of the treatment of interest on plant during construction, and its relationship to the measurement of AT&T's 1978 interstate earnings, is contained in Appendix A.

[6] Letter to Acting Chief, Common Carrier Bureau, from William R. Stump, Assistant Vice President, AT&T, January 19, 1979.

[7] The revenue required to produce an after tax rate of return of 10.0 percent for 1978 is $101.0 million less than the revenues shown on the IMR 1. Letter to Glen DeChabert, Common Carrier Bureau, from T. E. Lawrence, AT&T, October 26, 1979. AT&T Comments at para. 64. This dollar measurement has not been contested by any of the parties to this proceeding, and there is no question of fact incident thereto.

[8] Letter to William R. Stump, Assistant Vice President, AT&T, from Chief, Common Carrier Bureau, April 20, 1979.

[9] Letter to Chief, Common Carrier Bureau, from William R. Stump, Assistant Vice President, AT&T, May 3, 1979.

prescription? (2) If a calendar year assessment is not appropriate, what interval should be used? (3) What is the correct measurement of AT&T's earned rate of return during 1978? (4) Has AT&T exceeded its prescribed rate of return, and if so, by what dollar amount? (5) What remedial action should the Commission take if AT&T's earned rate of return has exceeded the prescribed level?[10]

6. Comments in response to those issues were filed by AT&T, the United States Independent Telephone Association (USITA), the United States Office of Consumer Affairs (USOCA), the General Services Administration (GSA), and the Massachusetts Public Interest Research Group (Massachusetts PIRG). Joint Comments were filed by the National Citizens Committee for Broadcasting, the Consumer Federation of America, the Missouri Public Interest Research Group, and the California Department of Consumer Affairs, (hereinafter collectively referred to as "NCCB"). AT&T opposed refunding any revenues that resulted in earnings in excess of 10.0 percent.

7. AT&T argued, *inter alia*, that the Commission did not have authority to order refunds of 1978 revenues. AT&T also contended that if the Commission had legal authority to order refunds, refunds were not warranted as a matter of discretion given AT&T's earnings history and then existing conditions in the financial markets. In addition, AT&T stated that its 1978 rate of return for all interstate services was not the 10.22 percent shown for 1978 on the IMR 1 but rather 10.09 percent because the 1978 IMR 1 reflected only the revenues, expenses, and investment that were associated with services provided at uniform nation-wide rates.[11] USITA also opposed any refund of AT&T's 1978 revenues, arguing that the Commission only has authority to prescribe actual rates, not a rate of return. In addition, USITA contended that the reasonableness of a given rate of return varies with changing economic and financial conditions.

8. GSA supported refunding those revenues that caused AT&T's 1978 earnings to exceed a 10.0 percent rate of return. USOCA also supported refunds after having noted that the Commission's 1976 prescription Decision had placed AT&T on notice that 10.0 percent was the maximum allowable rate of return. Both GSA and USOCA argued that 10.22 percent was the

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[10] *Common Carrier-Interstate and Foreign Earnings* (CC Docket No. 79-187), 75 FCC 2d 412 (1979).

[11] A further reduction of 20 basis points (to 9.89 percent) was viewed by AT&T as being preferable to the 10.09 percent figure because the 9.89 percent measurement reflected "full implementation of the Commission's Phase II decision in Docket No. 19129." AT&T Comments at 41.

correct figure for AT&T's 1978 earned rate of return. NCCB also supported refunds, but stated that the amount of the overage should be determined through evidentiary hearings. The Massachusetts PIRG filed a letter suggesting that AT&T's 1978 earnings in excess of 10.0 percent be used to establish a consumer action group to monitor AT&T.

9. AT&T, GSA, USOCA, and NCCB filed reply comments. AT&T argued that GSA, USOCA, and NCCB had failed to discuss the central issue in the case, erroneously assuming that the 10.0 percent figure constituted a ceiling for AT&T's rate of return despite changing economic conditions. Responding to this contention, GSA, USOCA, and NCCB argued that a rate of return prescription remains binding until changed by the Commission after a full hearing.[12]

II. DISCUSSION

A. Assessment of Measurements of AT&T's 1978 Interstate Rate of Return

10. Including its comments in this proceeding, AT&T has provided five earned rate of return figures for 1978. The Interstate Monthly Report No. 1 ("IMR 1"), that AT&T filed with this Commission as its statement of earnings on interstate and foreign operations, reported that AT&T's earned rate of return for the

[12] AT&T also argued that a time period other than a calendar year should be used for assessing compliance with a rate of return prescription. In its opposition the USOCA referred to *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, a frequently cited decision that refers to the annual returns that the Hope Natural Gas Co. was to achieve. *Id.* at 605. USOCA also observed that to use any measure other than the calendar year would ignore established regulatory standards. USITA stated that the exact earned ("*ex post*") rate of return of a common carrier can only be ascertained at the end of the carrier's fiscal year because it is only "at the end of the fiscal year [that] actual expenses can be subtracted from actual revenue and the result divided by the actual rate base for the year." We agree with USITA to the extent that the fiscal year of the carrier should control, as contrasted with the calendar year. The revenues, expenses, and assets of common carriers are typically subject to independent audit on a fiscal year basis, with income tax liabilities (and filings) being based upon data that are collected during each tax payer's fiscal year. Further, the Securities and Exchange Commission's annual corporate reporting requirements (including annual reports to shareholders) are based upon the fiscal year, with the consequence that the adoption of the fiscal year for assessments of AT&T's earned rate of return would assist investors, the public, and governmental entities in reviewing AT&T's operating results on a consistent basis. Accordingly, since AT&T's 1978 fiscal year was coincident with the calendar year, we conclude that we will confine our analysis to those issues that are raised by earnings that were achieved during AT&T's fiscal year ending December 31, 1978.

calendar year ending December 31, 1978, was 10.22 percent. On June 29, 1979, AT&T submitted a "1978 Annual FDC Report" that stated that AT&T's 1978 earned rate of return on its interstate and foreign services was 10.1 percent. On November 13, 1979, AT&T filed comments stating that the 10.1 percent was really 10.09 percent.[13] The 10.02 percent measurement was supplied by AT&T on January 19, 1979, in a letter from Mr. William R. Stump to the then Acting Chief of the Common Carrier Bureau which Mr. Stump further clarified by a letter to the Chief of the Common Carrier Bureau dated May 3, 1979.

11. The five different figures that AT&T provided are based upon three essentially separate concepts. The IMR 1 stated that the earned rate of return was 10.22 percent. AT&T's 1978 FDC 7 Report, which was based upon data for the month of June, 1978, stated that the earned rate of return was 10.09 percent (or 10.1 percent). AT&T also contended that the preceding measurements should be reduced by twenty basis points (0.20 percent) to reflect the Commission's decisions in Phase II of Docket No. 19129. We reject this later adjustment of twenty basis points for reasons that have been expressed in our decisions in other proceedings.[14]

12. We thus turn to the adjustments that were made to the 10.22 percent reported in the December, 1978, IMR 1 to arrive at the 10.09 percent that AT&T submitted in its "1978 Annual FDC Report" as its earned rate of return for 1978. By transmittal letter dated June 29, 1979, AT&T filed a "1978 Annual FDC Report." That report, which relied upon data for the *month* of June, 1978, purported to show the rate of return that AT&T had earned during the 1978 *calendar year* on each of its interstate services. Volume 2 of that report developed a "recast" of the IMR 1 that revised AT&T's December, 1978, IMR 1 to show an earned rate of return of 10.09 percent on AT&T's interstate services. The "recast" contained interstate investment, expenses, and revenues that had purportedly not been included in the prior IMR 1 reports that AT&T had supplied to this Commission. Specifically, AT&T stated that the IMR 1 had not included investment, revenues, or expenses that were incident to the

[13] In the second footnote on page 43 of AT&T's comments, AT&T stated: "[t]he 10.1 percent was a rounding of a 10.09 percent, so that the excess is only 9 basis points."

[14] At this point it is sufficient to note that we have already ruled upon this matter. *See Memorandum Opinion and Order In the Matter of The American Telephone and Telegraph Company*, 72 FCC 2d 1 (1979), and the discussion contained in Appendix A, *infra*.

provision of interstate services at "non-uniform rates."[15] Several aspects of AT&T's approach require that we not accord to the "1978 Annual FDC Report" adjustments the same weight that we attach to the figures that were contained in the December, 1978 IMR 1. For example, if "recasting" were required, actual data for the 1978 calendar year should have been employed for "recasting" rather than data that were selected for the month of June.[16] Second, no data have been presented that credibly establish that June, 1978, is a month that accurately represents the investment and/or expenses that were associated with the provision of facilities to the OCCs.[17] In this regard we concur in USITA's assessment that the measurement of excess interstate revenues for the fiscal year of a carrier requires *actual* interstate investment, expenses, and revenues for the entire fiscal year.

13. More important, however, is the fact that *this Commission has consistently relied upon the Interstate Monthly Report No. 1 in assessing AT&T's interstate earnings.* AT&T has supplied the IMR 1 reports to this Commission for approximately twenty-eight years as its summary of its interstate and foreign services operations. On July 25, 1979, AT&T, in response to specific questions as to measurement of AT&T's earned rate of return on interstate services for the calendar year 1978, stated:

> AT&T reports monthly to the Commission the interstate rate of return consistent with the Commission's past decisions as to the appropriate elements of revenues, expenses, taxes and net investment to be used in the calculation of the rate of return. *The report on which the interstate rate of return is shown is the interstate Monthly Report No. 1.*

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[15] In its "1978 Annual FDC Report", AT&T described "services provided at non-uniform rates" as being the use of its facilities pursuant to BSOC Tariffs Nos. 3 & 4, Western Union Contracts Nos. 1 & 2, and the use of its facilities by other common carriers. In its comments in this proceeding, AT&T stated that the 10.22 percent measurement contained in the December, 1978, IMR 1 has "[e]xcluded, *for example*, . . . revenues, expenses and investment associated with interstate facilities provided to other common carriers, foreign exchange channels between contiguous exchanges and less than fourteen miles in length, and link facilities for air-ground and coastal harbor service, and CATV channel service." (emphasis added)

[16] Presumably data for each of the twelve months in 1978 were available to AT&T during the Spring of 1979, given the fact that AT&T's IMR 1 for the month of December, 1978, states that it was issued on January 22, 1979.

[17] Additional issues arise with respect to the treatment of the adjustments that were made for facilities incident to the provision of services under BSOC Tariff Nos. 3 & 4 and Western Union Contracts Nos. 1 & 2. The Western Union Contracts Nos. 1 & 2 terminated on September 30, 1978, which would suggest that adjustments would be necessary to reflect the fact that no further activity under those contracts occurred during the months of October, November, and December, 1978.

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> [t]he rate of return of 10.22% shown on the December 1978 Interstate Monthly Report No. 1 is the rate or return for 1978 based on the Commission's directives appropriate to that year, including the December 21 [IDC] decision mentioned above. (Letter from Mr. William Stump to the Chief of the Common Carrier Bureau, dated July 25, 1979.) (emphasis added)

14. On September 27, 1979, additional information was requested from Mr. Thomas Lawrence, a member of AT&T's FCC Financial and Accounting Matters Staff, as to the measurement of the revenues that AT&T had received during 1978 that were in excess of the 10.0 percent specified in our decision in Docket No. 20376. Specifically, Mr. Lawrence was asked to

> [p]lease state: (1) what total revenues for 1978 would have been required to achieve an after tax rate of return of 10.00 percent and (2) the income tax rates (federal, state, and, if applicable, municipal) which have been applied to any revenues *which have resulted in earnings in excess of the 10.00% rate of return specified in Docket No. 20376.* (emphasis added)

In response thereto, Mr. Lawrence stated:

> Pursuant to your request, we have computed the revenues that would have been required to achieve an after-tax rate of return of 10.0% for the year 1978. The data utilized in the attached analysis indicates that *the revenues required to achieve a 10.0% return would have been $101.0 million less than the revenues shown on the Interstate Monthly Report No. 1 for the year 1978* as issued by AT&T on January 22, 1979. . . . (Letter from Mr. Thomas Lawrence, AT&T, dated October 26, 1979) (emphasis added).

15. In its comments in this proceeding, AT&T has also stated that an earned rate of return measurement of 10.22 percent would result in $101.0 million of revenues in excess of 10 percent.[18] In light of the information that is before us, we conclude that AT&T's 1978 interstate and foreign services revenues exceeded the level that was authorized by $101,000,000.[19]

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[18] AT&T Comments, para. 64.

[19] In the case before us here, there is no issue of tact that requires a trial type evidentiary hearing. We have relied upon the IMR 1 that AT&T has supplied to this Commission. AT&T's alternative measurements of its earned rate of return during 1978 (*vis.* 9.89 percent, 10.02 percent, 10.09 percent, 10.1 percent) have been rejected on the basis of our earlier decisions with respect to IDC (9.89 percent, 10.02 percent), and our assessment of the "1978 Annual FDC Report" (10.09 percent, 10.1) percent). The resolution of these measurement issues depends either upon the meaning of our prior decisions (see Appendix A, *infra*), or upon the fact that we accord no weight to the measurement of AT&T's rate of return that is contained in AT&T's 1978 Annual FDC Report. As AT&T noted in its Opposition to the NCCB petition, "the pertinent data are already before the Commission in reports routinely filed as well as previous correspondence . . . . . " AT&T Opposition at 3, n.* (filed August 2, 1979).

16. The $101 million in excess revenues that AT&T received[20] during 1978 are exclusive of interest. In prior refund cases, it has been our policy to award simple interest at the rate that has been computed by the Commissioner of the Internal Revenue Service. Although comments suggested that another interest rate be adopted, we see no compelling reason to depart from that well established practice here.[21] It has also been the Commission's practice to compute interest from the date of the complaint.[22] In this case, however, we have determined that the final date for the determination of AT&T's excess revenues is at the conclusion of AT&T's fiscal year on December 31, 1978. Accordingly, interest shall be calculated from that date, rather than from the December 20, 1978, date of the GSA letter. The Internal Revenue Service interest rates that were applicable from January 1, 1979 are: 6 percent from January 1, 1979, through January 31, 1980; 12 percent from February 1, 1980, through January 31, 1982; 16 percent from January 1, 1983, through June 30, 1983; 20 percent from February 1, 1982, through December 31, 1982; 11 percent from July 1, 1983 through December 31, 1984; and 13 percent from January 1, 1985 to June 30, 1985.[23]

B. Restitution

17. The Notice of Inquiry requested comments on the action that this Commission should take when the earned rate of return exceeds the rate that has been authorized. Information in response to that request suggests that the mechanism that entails the least administrative expense would require the imposition of a temporary discount upon interstate services for a period that is sufficient to reduce carrier revenues by the amount that is to be restored to interstate ratepayers. During the time that has elapsed since comments were received in this proceeding, the Bell System Operating Companies have been divested from AT&T, the Division of Revenues process has terminated, access charges have

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[20] AT&T's reported gross revenues were based upon tariffs that included connecting and concurring carriers that received revenues through the division of revenues and settlements processes.

[21] The National Citizens Committee for Broadcasting, the Consumer Federation of America and the Missouri Public Interest Research Group requested that interest be accrued at the prime rate. The USOCA supported that request.

[22] *Teleprompter Inc.* v. *Chesapeake and Potomac Tel. Co.* 79 FCC 2d 232, 238-39 (1980), *recon.* 85 FCC 2d 23 (1981); *Georgia Power Co.* v. *Columbus Cablevision, Inc.*, FCC 84-100 (released March 20, 1984) at para. 9 n.9.

[23] Rev. Rul. 83-171, 1983-47 I.R.B. 7; Rev. Rul. 84-66; IRB 1984-18 (April 30, 1984). *See* references cited in para. 16 n.22, *supra*.

been implemented, and earlier settlements procedures have been supplanted by the NECA administered distribution of access charges revenues under Part 69 of the Commission's rules.[24] Whatever weight might properly be ascribed to the conclusion that, in a pre-divestiture environment, temporary discounts on services are less expensive and more *efficiently* administered than cash refunds has added weight in the post-divestiture environment. In structuring an appropriate remedy, this conclusion is particularly compelling in light of the joint nature of the interstate services that were provided by AT&T, the Bell System Operating Companies, and the independent telephone companies during 1978. During that period, local exchange and other connecting carriers that received revenues that flowed from the provision of services pursuant to AT&T's interstate and foreign services tariffs also shared in aggregate revenues that were excessive. Traditional concepts of equity would, therefore, require that those entities that received excess revenues proportionately share the burden of restoring those revenues to the subscribers from whom they were received.[25]

18. Effecting restitution has been further complicated by the fact that it is virtually impossible to achieve a "direct targeting" of the amounts that should be refunded to particular recipients. Since 1978, ratepayers have died, changed names, and changed addresses. Corporations and other entities having *de jure* status as ratepayers during 1978 have been dissolved, estates have been liquidated and distributed, conservators have been appointed, and trustees in bankruptcy have become successors in interest to rights of bankrupt ratepayers in refunds. Moreover, even if each element within the class of 1978 ratepayers were still in existence and identifiable at ascertainable addresses, it would still not be possible to allocate the amount of 1978's excess revenues, with accrued interest, that should be directly refunded to each of those

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[24] 47 C.F.R. § 69.601 et seq.

[25] Section 201(a) of the Communications Act empowers the Commission, after opportunity for hearing, to establish the division of charges among common carriers that engage in the joint provision of interstate and foreign telecommunications services. 47 U.S.C. § 201(a) (1982). Section 201(b) requires that all charges "in connection with such communication service shall be just and reasonable," and "any such charge . . . that is unjust or unreasonable is hereby declared to be unlawful . . . ." 47 U.S.C. § 202(a) (1982). We have concluded that AT&T's 1978 interstate tariffs yielded excessive revenues to the providers of those services. As a consequence, it is not inappropriate to adjust the prospective division of charges among those carriers by their proportionate shares of the excess revenues that were received during 1978. We are herewith instituting the hearing that is required by Section 201(a) in the context of tariff revisions that we have required. *See* para. 25, *infra*. We recognize, in

ratepayers without additional proceedings that would be extensive and time consuming. Also, as we have heretofore observed, we cannot conclude, on the basis of AT&T's 1978 FDC study, that the proportions of the excess revenues that would be allocated to each tariffed service offering during 1978 would be correct.[26]

19. We have thus concluded that restitution can best be accomplished through a mechanism that will permit us to apply 1978's excess revenues, with accrued interest, to benefit subscribers utilizing the interstate and foreign telecommunications services of AT&T and its connecting and concurring carriers.[27] Accordingly, we direct AT&T to reduce its estimate of its 1985 revenue requirement by its proportionate share of 1978's excess revenues (including accrued interest),[28] and we further direct that the

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structuring the remedy that is contained herein, that the record in this proceeding is inadequate to permit a quantitative assessment of the restitution obligations of the independent telephone companies that participated in revenues that were derived from AT&T's 1978 tariffs.

[26] Para. 12, *supra*.

[27] *See Bebchick v. Public Utilities Commission*, 318 F.2d 187, 103-04 (D. C. Cir. en banc), *cert. denied*, 373 U.S. 913(1963) (opinion permitting utility commission to fashion relief to benefit a class of ratepayers where individual ratepayers who had been overcharged could not be identified). In this case, we could have ordered an immediate discount. However, we have recently imposed revisions to interstate tariffs for switched services and have been conducting an extended review of the private line and special access service tariffs. Additional revisions to reflect changes in assets, expenses, and patterns of demand in exchange access tariffs will be necessary periodically. Because the imposition of unnecessary administrative expense is undesirable, we have concluded that it will be more efficient to address the revenue requirement adjustments that we have required in the context of tariff revisions that will be occurring during 1985. This decision is based upon the fact we have previously established an orderly procedure for the annual revision of exchange carrier customer line charges, that provides for exchange carrier filings that are to have a scheduled effective date of June 1. *See* Section 69.3 of the Commission's Rules. Those revisions would ordinarily require changes in AT&T's interexchange tariffs, that would require an assessment of AT&T's supporting documentation. As a consequence, it would be administratively more efficient and less expensive to ensure that appropriate modifications have been made to interstate tariffs during the period that has been scheduled for that process, rather than providing for an additional round of tariff modifiations and review on top of those that have been required in the context of our most recent orders. We have also concluded that it is not feasible to disproportionately allocate 1978's excess revenues, with accrued interest, among categories of interstate services on the basis of AT&T's 1978 FDC Report (see para. 12, *supra*). At this point, we feel that the administrative, technical, and data complexities, that are associated with effecting restitution in a timely manner, require that we adopt the approach that is contained herein.

[28] The "Plan of Reorganization" that implements the "Modification of Final Judgment" provides that contingent liabilities that relate to interstate rates be apportioned on the basis of "relative investment devoted to interstate services as of the effective date of divestiture (as calculated in accordance with the FCC-prescribed Separations Manual in effect on the date of divestiture),

NECA shall reduce the estimated 1985 carrier common line pooled revenue requirement by the balance.[29]

C. Legal Authority

20. After a full hearing on the record, the Administrative Law Judge entered an Order in Docket No. 20376 that provided that AT&T's interstate earnings were not to exceed 10.0 percent.[30] After expressly affirming the decision of the Administrative Law Judge, the Commission stated that AT&T's earnings were "not to exceed 10 percent",[31] and further stated that it would "not require any downward adjustment of AT&T's overall interstate rates provided its overall rate of return does not exceed 10 percent."[32] AT&T did not, however, seek during 1978 to modify the rate of return prescription that AT&T now contends had been vacated by rapidly changing economic circumstances. Nor did this Commission or any court modify, during 1978, the Docket No. 20376 prescription orders. After receiving evidence during 1980, we did prescribe an interim date of return of 10.5 percent based upon the preliminary evidence that was then before us.[33] At that time we took care to point out that the Commission's Docket No. 20376 prescription orders had not lapsed, and that changes in

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adjusted to reflect the assignments of assets under this Plan of Reorganization (CPE and InterLATA assets to AT&T, and intraLATA assets to the BOCs)." "Plan of Reorganization", filed in *United States v. Western Elec. Co. & AT&T*, C. A. No. 82-0192 (D.D.C., filed December 16, 1982) at 188. We find that such an allocation would be a reasonable and equitable division of the restitution obligations of the exchange and interexchange carriers.

[29] Interest on AT&T's pro rata share of the $101,000,000 shall be accrued from January1, 1979, to the date upon which AT&T files tariff revisions that reflect the reductions in revenue requirements that have been ordered herein. The aggregate reduction in revenue requirements is to be allocated among the estimated revenue requirements for each service offering by a constant proportion (*e.g.* the revenue requirement of each service offering shall be reduced by a fraction that is equal to AT&T's total restitution obligation divided by AT&T's total 1985 interstate revenue requirement). Interest on the exchange carrier portion of the restitution obligation shall be computed from January 1, 1979, and shall conclude on the date that NECA files 1985 exchange carrier common line charges that reflect the restitution obligation that we have imposed today.

[30] *AT&T Co.* (Docket 20376), 57 FCC 2d 979, 1005 (1975).

[31] *AT&T Co.* (Docket 20376), 57 FCC 2d 960, 973 (1976).

[32] *Id.*

[33] *See* AT&T Petition for Determination of Fair Rate of Return in CC Docket No. 79-63 (filed March 8, 1979). *AT&T*, 78 FCC 2d 661, 668-70, 672 (1980). Based in large measure upon information that was provided with respect to economic conditions during 1981, we subsequently concluded that AT&T's prescribed rate of return should be increased to 12.75 percent. *AT&T*, 86 FCC 2d 221, 251 (1981).

AT&T's cost of capital could not "simply be determined by reference to changes in economic conditions without a hearing. Thus, we note that general fluctuations in the economy do not, as AT&T implies, weaken or invalidate an outstanding prescription such that a carrier may freely exceed it by filing increased rates."[34] The proper procedure for a carrier who contends that an outstanding order is improper is to petition the Commission to modify that order.[35] During 1978 AT&T did not conform to the Commission's procedural rules by seeking an order that would have vacated the 1976 prescription order. Accordingly, there is no statutory basis that would lead to the conclusion that the 1976 prescription was not in full force and effect during 1978.[36]

21. We next turn to an argument that was raised by USITA. In discussing the Commission's authority under Section 205(a), USITA stated "[t]he FCC accepted the rates filed by AT&T in 1976. These rates became lawful rates, and AT&T could charge neither greater nor lesser rates. Yet this is precisely what the Commission would be doing in ordering refunds for 1978."[37] In essence, USITA appears to contend that the interstate tariffs under which AT&T was providing service during 1978 were "lawful rates." In this regard, several observations are in order. First, the Commission had never made an affirmative finding that any of AT&T's tariffed charges during 1978 were "just and reasonable" within the meaning of the Communications Act. Second, tariffed charges of AT&T that were in effect during 1978 had been found by this Commission to be unlawful (see Appendix B, *infra*, and references cited therein). The continuation of those services was permitted because the detrimental effects that would have resulted from a disruption in the provision of those services outweighed the harm that would result from the continued provision of those services at rates that had not been adequately justified. We did not, however, intend that AT&T's charges would

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[34] *AT&T*, 78 FCC 2d at 666 n.7. Although AT&T contends that economic conditions during 1978 were sufficiently different to have vacated the 1976 prescription, we do not perceive AT&T's factual predicate to have been well founded. Our assessment of economic and financial market conditions that are of public record with respect to 1978, as well as AT&T's interstate earnings during 1978, reaffirms our conviction that AT&T's prescribed rate of return was within the correlative range of economic and financial market conditions that we considered at the time of the rate of return prescription in early 1976.

[35] *See* Sections 1.2, 1.106, and 1.401 of the Commission's Rules, 47 CFR §§ 1.2. 1.106, and 1.401 (1978). Commission orders continue in force until the Commission or a court of competent jurisdiction issues a superseding order. 47 USC § 408 (1978).

[36] *See AT&T*, 78 FCC 2d at 665–70.

[37] USITA Comments at 5–6.

result in revenues that exceeded the limit that we prescribed in Docket No. 20376.[38] USITA's contention that AT&T's interstate charges during 1978 were *ipso facto* lawful because they were filed at this Commission is incorrect. It is clear that under *Arizona Grocery v. Atchison, Topeka, and Santa Fe Railway Co.* that rates that become effective may subsequently be found to have violated statutory standards.[39] It is also clear under the Communications Act that a carrier is under an affirmative duty to revise its rates to conform to outstanding prescription order.[40]

22. Because Section 205(a) does not expressly contain the word "refunds", USITA further contends that any Commission action pursuant to a Section 205(a) prescription could not embrace refunds as a mechanism for remediation. While Section 205 does not specifically provide for the enforcement of Commission prescriptions through refund orders, Section 4(i) gives the Commission broad authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[41] In *Nader v. FCC*, the Court expressly recognized that the power to order refunds is inherent in the Commission's prescription authority.[42]

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[38] *AT&T*, 57 FCC 2d 960, 973 (1976); *AT&T*, 78 FCC 2d at 667. *See also* Appendix B, *infra*, and citations contained therein. The difficulties that the Commission was encountering with respect to AT&T's tariffs are described in *Docket No. 18128*, 61 FCC 2d 587 (1976), *recon.*, 67 FCC 2d 1441 (1978); *Notice of Inquiry in CC Docket No. 79-245* (In the Matter of American Telephone & Telegraph Co. Manual and Procedures for Allocation of Costs), 73 FCC 2d 629 (1979); *WATS*, 66 FCC 2d 9, 51-56 (1977), *recon.* 69 FCC 2d 2031 (1979); *DDS*, 67 FCC 2d 1195, 1229-30 (1978), *recon.*, 70 FCC 2d 616, 630-33 (1979). To the extent that services with associated charges that have been found to be unlawful have been provided through the use of plant that has been jointly used in the provision of other services at charges that have not been determined to be "just and reasonable", we confront a situation that, in the absence of enforcement of the overall rate of return prescription, would potentially permit carriers to achieve unlimited rates of return unless this Commission were to terminate the provision of those services.

[39] *Arizona Grocery* v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 384 (1931). *See Carterfone*, 13 FCC 2d 420, *recon. denied*, 14 FCC 2d 571 (1968).

[40] Section 205(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 205(a) (1978) (Commission may "prescribe what will be . . . thereafter observed . . . . ").

[41] 47 U.S.C. § 154(i) (1978). With respect to the relationship between Section 4(i) and Section 205(a), the Court in the *Nader* case stated that the "discretion that must be afforded the Commission in the exercise of its ratemaking power is enhanced by Section 4(i) of the Communications Act . . . " *Nader v. FCC*, 520 F.2d 182, 203 (D.C. Cir. 1975).

[42] *Nader v. FCC*, *supra*, at 204-05 n.25.

III. ORDERING CLAUSES

23. IT IS ORDERED That the GSA and NCCB petitions are granted to the extent stated in the rulings and procedures that have been adopted herein and are, in all other respects, denied.[43]

24. IT IS FURTHER ORDERED That restitution shall be effected as provided herein, and that changes in exchange carrier rates that implement this order shall be reflected in AT&T's estimated revenue requirements.

25. IT IS FURTHER ORDERED pursuant to Sections 4(i)-(j), 201, and 202 of the Communications Act, That comments may be filed within twenty (20) days from the date of each tariff filing that implements this Order, and reply comments may be filed within ten (10) days thereafter.

26. IT IS FURTHER ORDERED That the Secretary shall cause this decision to be published in the Federal Register.

27. IT IS FURTHER ORDERED That the Secretary shall, by registered mail, serve a copy of this decision and notice of hearing upon the American Telephone and Telegraph Company and each of the Bell System Operating Companies in accordance with Sections 416 and 413 of the Communications Act of 1934, as amended, and shall enter proof of service in the docket in this proceeding.

28. IT IS FURTHER Ordered that the Secretary shall transmit a copy of this order to the NECA.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix A

Interest During Construction

1. In correspondence with the Common Carrier Bureau, and in its comments in this proceeding, AT&T has asserted that the earned rate of return measurements that AT&T reported in the IMR 1 and the 1978 Annual FDC Report should be reduced by 0.20% on the basis of "full compliance" with Docket 19129 (Phase II). In the interest of brevity, those adjustments shall be referred to hereinafter as either the "Interest During Construction" or "IDC" adjustments. The 9.89% measurement of AT&T's earned rate of return for 1978 results from the deduction, by AT&T, of 1978's Interest During Construction from the revenues that AT&T's

[43] *See AT&T Co.* (Order Instituting Hearing), *supra*, at 690 n.4.

employed in presenting the 10.09% 1978 earned rate of return figure that was contained in AT&T's FDC Report. Similarly, the 10.02% measurement results from deducting IDC from the 10.22% figure that AT&T filed in its IMR-1 Report for December, 1978. To understand the nature of AT&T's contentions it is necessary to review "IDC" concepts and our decisions with respect to IDC from the ratemaking perspective that is relevant here. Subsequent paragraphs in this Appendix discuss IDC, our decisions with respect to IDC, AT&T's correspondence with respect to IDC, and the measurement of AT&T's earned rate of return during 1978.

2. When a utility constructs plant, the construction of the plant is frequently, although not necessarily, financed through the issuance of interest bearing debt. Inclusion of the interest that was incurred to finance the plant construction could result in "double counting"[1] and therefore a double recovery to the carrier if the plant that was under construction were also included in the carrier's rate base for allowed rate of return measurement purposes. As a hypothetical example of this possibility, assume that during 1978 a carrier had $573,478,000 of telephone plant under construction and had incurred $46,786,000 in interest during 1978 to finance that plant while it was under construction. If that carrier were permitted to earn an allowed rate of return of 10% on the plant under construction in its revenue requirements *for that year*, and also receive IDC, the carrier would have been permitted to earn $104,133,000[2] or 18.16%[3] on that investment as compared with the allowed rate of return of 10%.

3. The issue that AT&T raised in its letters of January 19, 1979, May 3, 1979, and in its comments with respect to IDC had its genesis in our consideration of AT&T's network capacity in the *Phase II Final Decision and Order in Docket No. 19129*, 64 FCC 2d 1, 44-60 (1977). At that time, we noted that our practice had been to "[i]nclude plant under construction in the rate base and charge interest during construction. The interest during construction is included in income for ratemaking purposes and is added to the construction work in progress to be included in utility plant when the construction work is placed in service." *Id.* at 56. An explanation of that treatment for rate making purposes will help to clarify the background that underlies AT&T's proposed adjustment.

4. Upon occurrence of the condition that the constructed plant is actually placed in service,[4] AT&T has been permitted to add IDC to the cost of that constructed plant, which, in turn, was then included in AT&T's rate base and depreciation expense for ratemaking purposes. To avoid "double counting", in the period(s) prior to the constructed plant's actual commitment to service (and subsequent thereto), we required, for ratemaking purposes, that while the plant was being constructed (termed "construction work in progress") the interest that was being

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[1] The "double counting" would occur as a consequence of allowing the carrier to earn its allowed rate of return (cost of capital) on the funds which were being used for constructing plant, while, at the same time permitting the carrier to accrue "interest during construction" which the carrier is subsequently permitted to recover from ratepayers.

[2] ($573,478,000) (.1) + $46,786,000 = $104,133,000.

[3] $104,133,000/$563,478,000 = .1816, or 18.16%.

[4] See *Phase II Final Decision and Order in Docket No. 19129*, 64 FCC 2d 1 46-53, 56-62 (1977).

incurred on the construction be *added* to the revenues of the carrier to offset the rate of return which the carrier was being permitted to earn upon the plant while it was being constructed. Not including the credit to revenues of IDC for ratemaking purposes would have resulted in the following consequences: (1) the carrier would be permitted to earn a rate of return on plant under construction; (2) the carrier would then be permitted to take the portion of return which was associated with the construction of the plant (IDC) and place that money in the rate base (thereby being compensated twice for the use of the money necessary for construction of the same plant); and (3) the carrier would subsequently be permitted to earn the allowed rate of return upon the IDC, for which the carrier had already been compensated when the carrier had been permitted to earn a rate of return on the plant while it was under construction (see (1), above).

5. A numerical illustration of these concepts may be helpful. Assume that a carrier's allowed rate of return is ten percent, that the carrier borrows at ten percent to finance construction, and that $10,000 in construction expenditures occur during 1978. Under this scenario, the carrier is permitted to recover its cost of capital (the allowed rate of return of ten percent) on the construction, or $1,000 ($10,000 x .1) during 1978. The subsequent inclusion of IDC ($10,000 x .1 = $1,000) during 1978 in the carrier's rate base would permit the carrier to recover a second round of capital costs (the "double count") when that carrier is subsequently permitted to recover the $1,000 of IDC in increased depreciation expense in subsequent time periods, and is also permitted to earn the allowed rate of return upon the IDC that is in the rate base. The offsetting entry that we had required from Docket No. 16258, 9 FCC 2d 960, 972 (1967), *reduced* the revenue requirement *by adding*, for *rate evaluation purposes*, IDC to the revenues that the carrier was receiving. This had the direct effect of increasing the measurement of the carrier's earnings for *ratemaking* purposes.

6. The treatment of IDC that was discussed in the three preceding paragraphs was examined by the Trial Staff in Docket No. 19129. In our *Phase II Final Decision and Order in Docket No. 19129*, *supra* at 60, we found "sufficient merit in the Trial Staff's criticism of our present procedures for treating PUC and IDC to institute changes to eliminate some of the problems it has asserted." Specifically, our Order stated:

> [w]e shall continue the practice . . . of including short-term construction projects in the current rate base as the investment is incurred. We shall, however, neither compute nor capitalize IDC on such amounts, but rather . . . treat short-term projects similarly to plant in service.
>
> * * *
>
> Furthermore, we shall require all projects which actually take longer than one year to complete to be removed from the rate base at the end of the year, unless given a waiver by this Commission. In that event, IDC will be computed starting at the end of one year in accordance with the procedures set forth below. Additionally, any project suspended longer than six months will be removed from the rate base and no IDC will be computed on such amounts. Projects designed with construction time exceeding one year will be removed from the rate base *ab initio* . . . .

64 FCC 2d 1, 59 (1977). In addition, we explained that:

> [w]e realize that changes to the Uniform System of Accounts will be

> required in order to implement these rate base changes, as projects with completion dates exceeding one year must be isolated from those taking less than one year. We are also concerned that the necessary accounting changes are not inconsistent with regulatory systems of the several states. Accordingly, we are by separate Order instituting a proceeding, pursuant to Section 220(i) of the Act . . . , to solicit the views of the states on the proposed accounting changes.

Id. at 60.

7. The proceeding to amend the Uniform System of Accounts ("USOA") as suggested in Docket No. 19129 was instituted by a Notice of Proposed Rulemaking, which was adopted on April 28, 1977 (Docket No. 21230), and published in the *Federal Register* on May 13, 1977, 42 *Fed. Reg.* 24291). In that Notice, we pointed out that in our *Phase II Final Decision and Order* in *Docket No. 19129* we had "prescribed, among other things, the treatment of certain plant and expense items for ratemaking purposes"; that "[a]lthough the investigation in Docket No. 19129 was limited to the operations of [AT&T] . . . the conclusion reached therein should be rules of general applicability"; and, that the USOA "should therefore reflect the rate base prescriptions." Our Notice of Proposed Rulemaking repeated the view expressed in Docket No. 19129 that "orderly implementation of certain of those prescriptions [including plant under construction] will require amendment of the Uniform System."

8. On February 24, 1978, subsequent to the institution of the rulemaking proceeding to modify the necessary accounts, we considered on our own motion (FCC 78-103, 67 FCC 2d 1429) the problem of plant under construction and IDC in Docket No. 19129 and observed that:

> [u]nder the provisions of our decision [Docket 19129], see para. 322, our revised treatment of Plant Under Construction (PUC) and Interest During Construction (IDC) for ratemaking purposes became effective for reporting year 1977. It was also originally determined that certain changes to our accounting rules were necessary for the orderly implementation of our revised policy. Accordingly, on May 9, 1977, we released a Notice of Rulemaking for comment by various states regarding the proposed amendments to the Uniform System of Accounts . . . . Until that time [*i.e.*, until the USOA is amended in accordance with the requirements of Section 220 of the Act], *present accounting rules will remain in effect, although, for ratemaking purposes*, interest is not to be calculated on projects scheduled to be completed in less than one year.

67 FCC 2d 1429, 1435-36 (emphasis added).

We further stated:

> *[w]e are using this opportunity to clarify the rate base treatment of IDC accrued before the effective date of the above accounting change. For the reason stated below, we find the appropriate treatment is to disallow such IDC for ratemaking purposes* during calendar year 1977. Traditionally, IDC has been designed, in part, to compensate investors for funds prudently invested in construction projects, since projects while under construction generally generate neither revenues nor profits. However, because we are allowing investment in construction projects that are completed in less than one year to be included immediately in the rate

> base, AT&T will have the opportunity to earn an immediate fair return. *To allow AT&T the additional opportunity to capitalize IDC at the time the associated PUC goes into service, and thus to recover such IDC over the life of the facility, would compensate AT&T's investors twice. We find such "double counting" not to be in the public interest and shall therefore disallow such IDC, effective January 1, 1977, from respondent's interstate rate base.*

Id. at 1436 (emphasis added).

9. About a month later, on March 27, 1978, Mr. William R. Stump, AT&T Assistant Vice President for FCC Financial and Accounting Matters, wrote to the Chief of the Common Carrier Bureau seeking additional information as to the treatment of IDC. The letter stated:

> [i]t is clear that the Commission intends to disallow the inclusion of IDC from the rate base, for ratemaking purposes, during the pendency of changes in the Uniform System of Accounts to avoid any possibility of "double dipping" during the Docket 19129 (Phase II) Final Order and the necessary accounting changes in Docket 21230.
>
> It also appears to be the Commission's intent in Paragraphs 14 and 15 to restore this IDC to the rate base once the new accounting changes go into effect and the opportunity for "double dipping" no longer exists.
>
> While this is a logical approach and appears to be the intent of the Commission, the wording in Paragraphs 14 and 15 is not as clear as it might be in this regard. It would be helpful if this point could be clarified in the Order prescribing the necessary accounting changes.

In reply, the Bureau Chief agreed with AT&T's interpretation that the Commission's intent in Docket No. 19129 was to exclude IDC from the rate base for ratemaking purposes pending necessary accounting changes as a means of avoiding the opportunity for "double dipping." On the other hand, unlike AT&T, the Bureau Chief did "not read the Commission's orders as evidencing an intent to restore the IDC to rate base once the new accounting changes prescribed by Docket 21230 become effective."

10. On May 11, 1978, the Commission issued the *Amendment of Part 31 Report and Order* (Docket No. 21230), 68 FCC 2d 902. Consistent with our findings in Docket No. 19129, our decision in Docket No. 21230 amended the USOA to require, *inter alia*, that the *account* for telephone plant under construction be subdivided into two parts: one to show those projects to be completed within one year (short-term projects); the other to show those projects to be completed in more than a year (long-term projects). Basically, those projects to be completed within one year were to be placed in the plant accounts immediately and no IDC was to be accrued thereon. Long term projects (*e.g.* those which are to be completed in more than one year) were to accrue IDC but were to be placed in plant accounts only when ready for service. Those *accounting* changes were ordered to become effective on January 1, 1979. See *Amendment of Part 31*, *supra*, at 908; *recon.*, FCC 79-678 (released November 6, 1979).

11. On June 2, 1978, AT&T filed an "Application For Review" challenging the conclusions reached by the Bureau Chief in his May 8, 1978, letter "as contrary to statutory requirements, case precedent, the Commission's decision in Docket 19129

Phase II and Commission policy." AT&T requested that we set aside the Bureau Chief's conclusions and hold instead:

1. that IDC accrued by AT&T on short term Plant Under Construction in 1977 and 1978 was allowable for interstate ratemaking purposes; and

2. that the Bureau Chief exceeded his authority in concluding that interest accrued on short term plant during 1977 and 1978 should be written off AT&T's books as an unrecoverable cost.

AT&T's Application For Review also stated:

> [w]hile it is true, as [the Common Carrier Bureau Chief's] letter states, that "capitalized IDC is recovered through increased depreciation charges over the life of the plant on which IDC was initially accrued" *this does not amount to double counting, so long as the IDC is included as income for ratemaking purposes . . . (emphasis added)*

12. Thus, AT&T's June 2, 1978, Application For Review requested, for ratemaking purposes during 1977 and 1978, that this Commission continue in effect the IDC treatment that AT&T was then using for accounting and ratemaking purposes in its IMR 1 reports which was, in fact, the same accounting and ratemaking treatment that this Commission had prescribed in 1967 in Docket No. 16258. *As noted above, AT&T expressly stated that IDC, under that method, must be included with income for ratemaking purposes to offset the "double counting" that would otherwise result.* Upon further consideration, we granted AT&T's request that had the consequence that insofar as the ratemaking treatment of IDC on Plant Under Construction was concerned for 1977 and 1978, *AT&T would continue its existing reporting of IDC* (which included the revenue credit of IDC to offset "double counting") and that our ratemaking assessment would correspond thereto.[5]

13. Against this factual backdrop, we now consider AT&T's statements regarding the appropriate treatment of IDC during 1978 insofar as they concern the measurement of AT&T's earned rate of return for 1978. On January 19, 1979, AT&T stated, with respect to AT&T's earned rate of return during 1978: "[i]n 1978, on the basis of full compliance with Docket 19129 (Phase II) requirements it was 10.02% - for all practical purposes, right at the upper part of the range . . . ." (Letter from Mr. William Stump, AT&T, to the Acting Chief of the Common Carrier Bureau, dated January 19, 1979).

14. On May 3, 1979, in response to a letter by the Chief of the Common Carrier Bureau with respect to the 10.02% measurement, AT&T stated:

> [y]ou ask that we fully explain the difference between the 10.22% rate of return reported on the Interstate Monthly Report No. 1 (IMR 1) and the 10.02% rate of return mentioned in my letter as having been calculated on the basis of full compliance with the Docket 19129 (Phase II) requirements.

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[5] *See In the Matter of the American Telephone and Telegraph Co.*, 72 FCC 2d 1 (decided December 21, 1978; adopted in final form on May 30, 1979; released June 1, 1979).

> The 20 basis point difference between the 10.22% reported on the December 1978 IMR 1 as the 1978 interstate ratio of net earnings to average net investment and the 10.02% ratio mentioned in my letter to you as the 1978 ratio on the basis of full compliance with the Docket No. 19129 requirements *results from the adjusting out of amounts of interest during construction accrued on short-term plant under construction in 1978* (see Attachment). The 1977 and 1978 operating results reported in the 1978 IMR 1's reflected the Docket No. 19129 decision except for the accrual of these amounts of interest during construction because the changes to Part 31 of the Commission's rules which would result in full implementation of this Decision in this regard were not effective until January 1, 1979. (Letter from Mr. William R. Stump, AT&T, to the Chief, Common Carrier Bureau, dated May 3, 1979.) (emphasis added)

15. In response to further inquiry as to the measurement of AT&T's earned rate of return during 1978, Mr. Stump stated, in a letter to the Chief of the Common Carrier Bureau that was dated July 25, 1979: "[t]he rate of return of 10.22% shown on the December 1978 Interstate Monthly Report No. 1 is the rate of return for 1978 based on the Commission's directives appropriate to that year, including the December 21 decision mentioned above."

16. In its comments in this proceeding, AT&T has stated: "[t]he 10.02 and 9.89 percent measurement differ from the 10.22 and 10.1 percent measurements, respectively, only in that the former two measurements, but not the latter two, reflect full implementation of the Commission's Phase II decision in Docket 19129." (AT&T comments, para. 63.) AT&T further stated, in a footnote to paragraph 64 of its comments, that: "[t]he 10.1 percent was a rounding of a 10.09 percent, so that the excess is only 9 basis points."

17. Thus, AT&T has stated in its letter of May 3, 1979, and in its comments in this proceeding that the difference between 10.02% and the 10.22% reported in AT&T's December, 1978, IMR 1 results from AT&T's "adjusting out" IDC for 1978. Similarly, the 9.89% measurement supplied in AT&T's comments (paras. 60, 63, 64) results from AT&T's "adjusting out" IDC for 1978 from the 10.09% earned rate of return that AT&T reported in its "1978 Annual FDC Report." As heretofore noted, those proposed downward IDC adjustments and the earned rates of return measurements associated therewith have been rejected. As we have heretofore stated *for ratemaking as well as for accounting purposes during 1978, IDC must be added to AT&T's revenues for interstate and foreign services to prevent double counting.* In its June 2, 1978, Application For Review, AT&T acknowledged that IDC must be added to income to prevent double counting during 1978 (see para. 11, *supra*), and our June 1, 1979, Memorandum Opinion and Order expressly recognized that fact. *See Memorandum Opinion and Order In The Matter Of The American Telephone and Telegraph Company*, 72 FCC 2d 1, 6 (1979). The "full implementation of the Commission's Phase II decision in Docket 19129" to which AT&T refers (AT&T comments, para. 63; AT&T letters of January 19, 1979, and May 3, 1979) not only involved accouting changes that were effective on January 1, 1979, *but also involved concommitant ratemaking changes to prevent double counting that were also not effective until January 1, 1979.* AT&T's proffered "full implementation" of our Phase II Decision in Docket No. 19129, by now including for 1978 inapplicable January 1, 1979, accounting changes (which intentionally were not to become effective until January 1, 1979), would, for

1978, result in the exact result that we have consistently sought to avoid: a double recovery of IDC.

Appendix B

1. This Appendix contains a brief history of AT&T filings and FCC proceedings that relate to tariffs under which AT&T was providing interstate services during 1978.

2. On January 29, 1976, AT&T filed "Transmittal No. 12497" which contained revisions to Tariffs FCC Nos. 259, 260, 263, 264, and 267, which were represented as having been designed to yield a 9.5% rate of return. On February 5, 1976, after a full hearing, the Commission released a Memorandum Opinion and Order in Docket No. 20376, 57 FCC 2d 960 (1976), which prescribed a fair rate of return for AT&T of 9.5% and permitted AT&T to earn an additional 0.5% as "an incentive to increased productivity and efficiency." *Id.* at 973. On March 1, 1976, we released a Memorandum Opinion and Order in Docket No. 20732, 58 FCC 2d 1 (1976), which considered the tariff revisions that we contained in Transmittal No. 12497. As noted therein, numerous issues were raised by participants in that proceeding that were also, in part, being considered in Docket Nos. 18128, 19989, and 20288. Accordingly, pursuant to Sections 4(i), 4(j), 204, 205, and 403 of Communications Act of 1934, as amended, the tariff revisions that were contained in Transmittal No. 12497 were suspended for one day, a hearing was instituted into the lawfulness of those tariff revisions, the hearing was held in abeyance pending further order of this Commission, and we required "that AT&T maintain an accounting of the revenues derived under these revised tariffs, for possible refund upon resolution of the lawfulness thereof." *Id.* at 5. On March 26, 1976, we released an "Errata" in Docket No. 20732, FCC 76-248, 58 FCC 2d 905 (1976), which, *inter alia*, revised paragraph 14 of our Memorandum Opinion and Order in Docket No. 20732, *supra*, at 5, to read:

> [f]or the reasons indicated we shall order AT&T and all participating telephone companies to maintain accounts by service classes and sublcasses, in the aggregate, specifying the amounts of all increases and the service classification for which such amounts are accounted. Classifications for which accounts must be kept are as follows: (1) private line services, by series; (2) MTS and WATS, insofar as rates have been increased, and for each classification of service (e.g., dial station, operator-assisted, inward WATS, outward WATS, etc.); (3) DDS; and (4) all other services.

58 FCC 2d 1, 5 (1976). Service of the Errata upon AT&T was effected on March 26, 1976. On March 29, 1976, the Commission released a Memorandum Opinion and Order in Docket No. 20736 (In the Matter of American Telephone and Telegraph Company Revision to Tariff FCC No. 260 (Series 1000)), 58 FCC 2d 899 (1976), which similarly provided for the suspension of certain AT&T tariff revisions, the institution of a hearing at a date to be specified, and the imposition of an accounting order upon AT&T and upon all carriers participating in the provision of the Series 1000 service. *Id.* at 903. In our Final Decision and Order in Docket No. 19989, 59 FCC 2d 671, 709-10 (1976), after having found the WATS tariff filings at issue therein to be unlawful, we stated

> [a]lthough the WATS tariff has been found unlawful as indicated herein, there is a clear public interest requirement for continuity of Inward and

> Outward WATS service to the public. Further, this procedure will avoid the confusion and administrative difficulties which would likely arise if an alternative WATS tariff was filed to become effective during the interim period while Bell prepared the tariff filing required by our Decision. Finally, we note that existing accounting orders shall continue as set forth herein to protect the public and we retain our rights to investigate or reject or impose an accounting order with respect to the tariff revisions which Bell must file. In view of the foregoing, the course outlined above will best serve the public interest.
>
> Our Designation Order herein imposed an accounting order by individual customer account on Bell for all charges which were increased under the filing of Transmittal No. 11935, 46 FCC 2d at 86. No accounting order was imposed for the increased charges resulting from Bell's March 1975 filing under Transmittal No. 12303, 52 FCC 2d 155, 156, and a 'class' accounting order was imposed for the increased charges resulting from Bell's February 1976 filing under Transmittal No. 12493, Docket No. 20732, 58 FCC 2d 1, 4-5 (1976). Moreover, an accounting order by individual customer account remains outstanding with respect to the 1973 WATS rate increases, 40 FCC 2d 18, 20. As indicated above, we have found the foregoing WATS tariff filing unlawful. In the normal case where charges are found unlalwful after hearing, we would prescribe lawful rates, and therefore know what portions of the increases are lawful. Here, however, we have an insufficient record to support a rate prescription, and we therefore believe it an appropriate exercise of our discretion not to order any refunds pending consideration of the tariff revisions filed in accordance with this Decision. Accordingly, we will leave the accounting orders now pending in effect. However, to the extent possible, we shall order Bell to convert the existing accounting orders by individual account into "class" accounting orders, i.e., for Outward MT, Outward FBD(FT), Inward MT and Inward FBD(FT) services, upon the effective date of this decision . . . .
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> * * * *
>
> IT IS FURTHER ORDERED, that the accounting orders pursuant to 40 FCC 2d 18, 20 and 46 FCC 2d 81, 86 SHALL BE CONVERTED to class accounting orders (for Outward MT, Outward FT/FBD, Inward MT, Inward FT/FBD categories of service) insofar as feasible.

Id. at 709-10. By subsequent Memorandum Opinion and Order in Docket No. 19989, 64 FCC 2d 538, 540-41 (1977), which was released on April 18, 1977, we clarified the earlier accounting orders in Docket No. 19989, *supra*, at 709-10, by stating:

> [i]n its Reply to AT&T's Opposition, National Data restates its view that existing individual accounts should not be destroyed nor converted to class acounts if the effect would be to eliminate the basis for possible individual customer refunds, for WATS customers who have relied upon the accounting order by individual account issued by the Commission for the period March 14, 1973 to March 8, 1975 as the ultimate source of relief. National Data points out that with respect to future individual account record keeping it has not sought to require compilation of such records. It

> also does not deny that it is "concerned about its own hopes for a refund," claiming it has suffered several dramatic increases in its WATS charges since 1973, much to the detriment of its business operations and economic well being. National Data further renews its request that the Commission provide AT&T's WATS customers some indication as to its view of the likelihood that individual refunds, for the years 1973, 1974 and 1975, will be ordered so that if necessary, such customers may consider seeking alternate relief. Finally, National Data claims its participation in the informal discussions between AT&T and the Bureau will be of assistance due to its thorough knowledge of the issues which it obtained as a party to Docket No. 19989. To the extent indicated below, we grant the relief requested by National Data. In regard to National Data's concern about accounting orders and records, our March 1, 1976 action in Docket No. 20732, *supra*, sets forth the public policy reasons justifying the entry of class accounting orders and supports the conversion of accounting orders by individual customer account to class accounting orders as ordered in this particular case. In our March 1, 1976 action, 58 FCC 2d at 4, we stated that "[i]n major rate cases . . . , the imposition of individual accounting requirements [is] a costly, ineffective means of protecting the public interest." Although we ordered the conversion to class accounting, and reaffirm that decision here, we never expected AT&T to physically convert the two accounting orders until we first decided whether or how any alleged refund liability was to be considered or determined. See 59 FCC 2d at 709. Thus, no destruction of existing individual account records, which is National Data's major concern, has occurred or will occur in the future pending further Commission order.

64 FCC 2d 538, 540-41. In the Phase II Final Decision and Order in Docket No. 19129, 64 FCC 2d 100-01, 110, released on March 1, 1977, we terminated the outstanding accounting orders with respect to AT&T's Message Telecommunications Service. On May 9, 1977, this Commission issued a clarifying Memorandum Opinion and Order, FCC 77-310, which, *inter alia*, stated:

> [O]n March 1, 1977, we released the Phase II Final Decision and Order in our Docket No. 19129 investigation of AT&T, FCC 77-150, 64 FCC 2d 1. We found in that proceeding, *inter alia*, that the rate level of AT&T's Message Telecommunications Service (MTS), reflected in the earnings ratio from the service through 1975, was just and resonable during the period of this proceeding. Para. 253. Accordingly, we concluded that maintenance of the outstanding accounting orders, with the costs thereof placed upon the operating expenses of AT&T, was no longer required and terminated all such accounting orders with respect to MTS. Paras. 276, 328. In the Phase II Final Decision, *supra*, we found the overall rate levels of MTS reasonable through 1975, but we have taken no position on the lawfulness of the 1976 rate increase. As long as the question of the reasonableness of the MTS rate level in that filing remains under question (footnote omitted), we believe it inappropriate to terminate the MTS 1976 accounting order. Therefore, we hereby clarify that para. 328 of the Phase II Final Decision, *supra*, does not terminate the accounting order in this proceeding [Docket No. 20732].

> Accordingly, IT WAS ORDERED, That the accounts ordered in this proceeding at 58 FCC 2d 1, 5 (1976) shall continue to be kept until further order of this Commission.

3. On May 9, 1977, the preceding Memorandum Opinion and Order in Docket No. 20732 was served upon AT&T. Pursuant to Section 408 of the Communications Act of 1934, as amended, 47 USC § 408, that order remained in full force and effect during 1978.

4. By Memorandum Opinion and Order in Docket No. 18128, 61 FCC 2d 587, 669 (released October 1, 1976), this Commission terminated all extant accounting orders in Docket No. 18128. However, upon reconsideration, by Memorandum Opinion and Order released on June 13, 1977, 64 FCC 2d 971, 993, we reinstituted the accounting orders in Docket No. 18128. Upon further reconsideration, Second Order on Reconsideration in Docket No. 18128, 67 FCC 2d 1441, 1453 (released February 24, 1978), we reaffirmed the reinstitution of the extant accounting orders in Docket No. 18128, and stated:

> [a]s noted above, certain rate increases were found unjustified while others like Telpak are still subject to further proceedings. This circumstance allows that certain users may have been overcharged and may be entitled to refunds either presently or at the outcome of the proceeding. Clearly, the carrier, which has the burden of justifying its rates, should carry the risk of failure in the proceeding, not the customer. AT&T would have us place the customer in the position of bearing the entire risk of overpayment in the event that rates are proven unlawfully high. We must reject the view, and therefore hold that maintenance of the accounting orders is necessary to continue to protect customer interests still extant in this proceeding.

Id. at 1453.

5. During 1978, AT&T had in effect several tariffed rates that the Commission has found to be unlawful or that have been continued pursuant to Court order. During April, 1976, AT&T filed Tariff revisions 12546 and 12547 introducing the multi-schedule private line (MPL) rates. On May 19, 1976, the Commission suspended the effective date of the MPL rates, and set those rates for investigation. In the Matter of American Telephone & Telegraph Company, 59 FCC 2d 428 (1976). At that time, we stated:

> [s]ubstantial questions have been raised concerning the lawfulness of the MPL rate structure. Some of the specific features of the tariff which need close scrutiny are, among others, the increases in the charges of services of 25 miles or less in length, the high charge for the first mile of service, the possible anti-competitive implications of the decreases in charges for long haul services, and the possibility of unlawful discrimination between users.

Id. at 431. The MPL rates became effective on August 20, 1976, following expiration of the three-month suspension period. Those rates remained in effect with minor revisions through 1978. On March 19, 1979, the Administrative Law Judge, after a lengthy hearing, released his decision. As reported in the Commission's final decision, the Administrative Law Judge:

> found eight separate violations of Docket No. 18128 requirements in the MPL cost studies. He thus concluded, that the costing practices and

> classifications underlying those cost studies are not just and reasonable within the meaning of Section 201(b) of the Communications Act (47 USC § 202(b)); that AT&T has failed to demonstrate that such classifications and practices would not constitute an unjust or unreasonable discrimination in violation of Section 202(a) of the Act. (47 USC § 202(a)); and that AT&T has not met or even attempted to meet the cost allocation guidelines set out in the Docket No. 18128 Decision. The Judge concluded that the Series 2000/3000 transmittals at issue are unlawful and must be rejected.

In the Matter of American Telephone and Telegraph Company, 74 FCC 2d 1, 7 (1979). On September 20, 1979, the Commission in its Final Decision in Docket No. 20814 found that as a consequence of the use of AT&T's basic service philosophy, AT&T had "failed to carry its burden of justifying the MPL tariff under Section 201(b) of the Act in accordance with Docket No. 18128 requirements." 74 FCC 2d 1, 41 (1979). The Commission then concluded that the public interest required that AT&T's tariff remain in effect until the Commission was in a position to prescribe new rates, or until a new carrier initiated tariff became effective. In the Commission's Final Decision and Order in Docket No. 19989, 59 FCC 2d 671 (1976), *recon.*, 64 FCC 2d 538 (1977), the Commission, in considering AT&T's WATS tariff rates, concluded that:

> pursuant to Section 201(b) and 202(a) of the Act, the tariff schedules filed with Bell Transmittal Nos. 11657 and 11935 (and revisions thereto) are found unlawful as indicated herein, ARE NULL AND VOID, effective 210 days after publication of this Decision in the Federal Register.
>
> IT IS FURTHER ORDERED, That Bell shall file tariff revisions accompanied by the information required by Section 61.38 of the Commission's Rules, 37 CFR 61.38, and which meet the guidelines specified herein;
>
> * * * *
>
> IT IS FURTHER ORDERED, That the provisions of Section 61.58 of the Commission's Rules, 47 CFR 61.58, ARE WAIVED, and the tariff revisions to be filed on not less than 60 days notice; 59 FCC 2d 671, 709-710.

In response to this order, AT&T filed Transmittal 12745 which was to become effective on August 1, 1977. On July 21, 1977, the Commission concluded that

> AT&T's WATS tariff filing, Transmittal No. 12745, IS REJECTED, except to the extent WATS services are to be initiated to and from points outside the 48 contiguous states . . . .
>
> IT IS FURTHER ORDERED, That the effective date of paragraph 90 of our Decision in Docket No. 19989, 59 FCC 2d 671, 709-710 (1976), which declared the present WATs tariff null and void IS DEFERRED, pending further Commission Order.

In the Matter of American Telephone and Telegraph Company (Long Lines Department) Revisions to Tariff FCC No. 259 Wide Area Telecommunications Service (WATS), Transmittal No. 12745, 66 FCC 2d, 62-63 (1977).

6. On November 21, 1978, the Commission, in the preceding WATS Decision, set forth a mechanism for the filing of revised WATS tariffs. Thus, the WATS tariffed rates, found to be unlawful in 1976, remained in effect during 1978 with the minor exceptions noted above. On January 17, 1977, the Commission released the Memorandum Opinion and Order In The Matter of American Telephone and Telegraph Company Investigation Into The Lawfulness Of Tariff FCC No. 267, Offering A Dataphone Digital Service Between 5 Cities (Docket No. 20288), 62 FCC 2d 774 (1977), *recon. denied*, 64 FCC 2d 994 (1977), regarding the provision of dataphone digital service. In that Decision, the Commission stated:

> [T]he rates and conditions of AT&T's Tariff No. 267, as specified herein, are unjust, unreasonable, and unlawful, in violation of § 201(b) of the Communications Act . . . . Accordingly, we require AT&T to file an interim tariff offering dataphone digital service at rates designed to yield the 9.5% return, as provided herein, no later than February 22, 1977, effective on thirty days notice.

62 FCC 2d FCC 2d 774, 807 (1977). AT&T filed interim rates patterned after the rates in Tariff No. 260 (Series 2000/3000) under Transmittal 12687 which became effective on March 24, 1977. In allowing those tariffed rates to become effective, the Commission stated:

> [we] find that AT&T has substantially complied with our guidelines set forth in the Docket 20288 Decision. Upon examination of the arguments in the petitions for investigation and rejection, we cannot agree that the requested relief is warranted. Therefore, we will allow the tariff revisions which reflect the interim rates to become effective.

In The Matter Of American Telephone and Telegraph Company, 63 FCC 2d 936, 937 (1977). On July 25, 1977, AT&T filed revised Dataphone Digital Service ("DDS") tariffs under Transmittal 12790 to become effective on January 16, 1978. On January 12, 1978, the Commission rejected proposed DDS tariff rates on the ground that the filing did not comply with the Commission's Order in Docket No. 20288. In The Matter Of American Telephone and Telegraph Company Revisions Of Tariff No. 267 Dataphone Digital Service (DDS), 67 FCC 2d 1195 (1978), *recon. denied*, 70 FCC 2d 616 (1979). Since its initial tariff offering service to five cities, AT&T expanded in phases the number of cities to be served. Each incremental tariff filing for each incremental service was based upon the interim rates that were filed in 1977.

7. On October 1, 1976, the Commission released its Memorandum Opinion and Order in Docket No. 18128, 61 FCC 2d 1444 (1978), *aff'd. sub nom.* Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221 (D.C. Cir., 1980), *cert. denied.* 451 U.S. 920 (1981). In that Decision, the Commission found that it was:

> [u]nable to find that the TELPAK offering, as presently structured, constitutes a proper response to the extent of competition posed by private microwave. We nevertheless believe that a properly structured bulk rate offering, which would compete with private microwave or other competitive alternatives is justified. However, it is clear from the record herein, that the *nationwide* rate differential existing between TELPAK and like private line service cannot be supported by alleged cost comparability between TELPAK and hypothetical private microwave systems.

61 FCC 2d 587, 658 (1976) (emphasis in the original). In response to this finding, the Commission concluded that:

> The rate level differential existing between TELPAK and other private line services constitutes an unlawful discrimination between like services under Section 202(a). We do recognize, however, the benefit to industrial, transportation and government users from a bulk offering. Bell may file within the eight month period outlined below a new appropriately responsive bulk offering consistent with our guidelines herein, which can be supported on the basis of competitive necessity, costs, or other relevant factors.

Id. at 659. In response to this directive, AT&T filed tariff changes to eliminate the Transmittal No. 12714 TELPAK (Series 5000) offering. On reconsideration of the Final Decision in Docket No. 18128, the Commission decided that:

> [c]onfusion on the [scope of the Notice of questions at issue] may have resulted from differing statements contained in orders issued during this somewhat convoluted and protracted proceeding. We shall on this ground reconsider the matter of TELPAK's lawfulness as well as whether the return levels on these discounted rates fall within the zone of reasonableness.
>
> * * * *
>
> Consequently, we set aside, and accordingly stay our Order requiring Bell to eliminate TELPAK by June 8, 1977 . . . and will conduct an expedited hearing on the question of TELPAK's lawfulness in general under Sections 201(b) and 202(a) of the Act.

64 FCC 2d 971, 985 (1977).

In addition, the Commission stated:

> [i]n conclusion, on reconsideration we find that the TELPAK discounts, now subject to termination at the carrier's option, have not yet been justified on the basis of either a cost differential, an overall return level, or competitive necessity. Such justification will be the subject of the further hearings we are ordering herein.

Id. at 989. On June 2, 1977, the Commission issued an Order denying petitions to suspend or reject AT&T's tariff filing terminating the TELPAK offering. In The Matter of American Telephone And Telegraph Company Long Lines Department Revisions To FCC Tariffs No. 258 and 260 (series 5000) Termination of TELPAK Service, 64 FCC 2d 959, 968 (1977). On July 21, 1977, the United States Court of Appeals for the District of Columbia Circuit enjoined AT&T from discontinuing the TELPAK offering to existing customers pending review of the Commission's Order allowing the terminating tariff to take effect. Those TELPAK rates remained in effect through the period under consideration here.

8. Thus, the Commission had not only found specific AT&T tariffs that were in effect during 1978 to have been unlawful, but the Commission had also imposed accounting orders with respect to interstate services that were being provided by AT&T. To the extent that services with associated charges that have been found to be unlawful have been provided through common plant with other services at

charges that have not been found to be "just and reasonable", we confront a situation that, in the absence of an upper bound to the carriers earnings, would potentially permit unlimited rates of return on regulated services. We do not believe that Congress intended such a result. Nor do we believe that such a consequence would be consistent with Section 1 of the Communications Act of 1934 or the obligations that are imposed under Sections 201-205 of the Communications Act.

CATV Cross Ownership by Broadcasters

Petition for rule making to consider repeal of cable/local b/c TV station prohibition of Sec. 76.501 denied. Sec. 76.501(b)(2) amended to require divestiture of all existing egregious cable/broadcast TV cross-interests.
—*CATV Cross Ownership*
Docket No. 20423

FCC 84-527

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendement of the Commission's Rules to Delete Restrictions on Cable Television Broadcast Television Cross-Ownership	RM-3810
Divestiture Requirement of Section 76.501 Relative to Egregious Cable Television Broadcast Television Cross-Ownership in Existence on or before July 1, 1970	Docket No. 20423

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 1984; Released: December 4, 1984

BY THE COMMISSION:

Introduction

1. Before the Commission is a petition for rule making filed by Marsh Media, Ltd. (Marsh), on November 24, 1980.[1] The petitioner seeks repeal of Section 76.501 of the Commission's Rules that restricts the ownership of cable television properties by television broadcasters.[2]

[1] Marsh is the owner of four television stations and eleven cable television systems.

[2] Section 76.501 prohibits cross-ownership between a cable television system and a national television network or a local broadcast station. Marsh's petition

Marsh Media Petition

2. Section 76.501(a)(2) of the Commission's Rules prohibits cross-ownership between a cable television system and a broadcast station whose predicted Grade B contour overlaps the area served by the cable system. The rule was adopted because the Commission believed that it would further its "policy favoring diversity of control over local mass communications media."[3] In its petition, Marsh states that the rule should be repealed on the grounds that it goes beyond the Commission's jurisdiction, is an infringement on the First Amendment rights of broadcasters and that there is no practical evidence that this restriction serves the public interest.[4]

3. On October 30, 1984, the Cable Communications Policy Act of 1984 (Cable Act) was enacted. Section 613(a) of the Cable Act codified the Commission's present prohibition of cable television system ownership by local television broadcasters. As a result, the Commission does not have the discretion to amend the rule. Accordingly, Marsh's petition for rule making is herein denied.

Divestiture of Egregious Cases

4. Section 76.501(b)(2) of the Commission's Rules grandfathers those cable/broadcast station cross-interests considered non-egregious (i.e., those cases where the broadcast station was not the only commercial broadcast station providing principal community service to the cable community) that were in existence on or before July 1, 1970, the rule's effective date. It also defines the effective date to be applied to cause divestiture of those egregious cable/local television entities which existed prior to the adoption of the cross-ownership restrictions. However, this portion of the rule has been revisited in numerous Commission proceedings, but has never become effective.[5] The most recent action was the *Third*

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focuses on the portion of the rule relating to cross-ownership by local stations. Network ownership of cable systems is the subject of Docket 82-434, 91 FCC 2d 76 (1982).

[3] *Second Report and Order*, Docket 18397, 23 FCC 820 (1970).

[4] Appendix A is a list of commenters. Public Notice (RM-3810), December 17, 1980. With regard to the cable/local broadcast cross-ownership issue, all five commenting parties reiterate arguments made by Marsh. Several commenters also discuss the rule banning network cable cross-ownership and CBS' request for waiver of that rule, which was pending at that time.

[5] Originally, the rule required divestiture of all existing cross-interests by August 10, 1973. *Second Report and Order*, Docket 18397, 23 FCC 2d 816 (1970). This deadline was subsequently extended until August 10, 1975, and parties were allowed to file waiver petitions for grandfathered status. *Memorandum Opinion*

Report and Order in Docket 20423 where the Commission determined that complete divestiture was not necessarily the most appropriate means of achieving the public interest goals of enhanced competition in both the economic and idea marketplaces in all cases. The Commission decided to grandfather the 13 remaining non-egregious cable/broadcast cross-interests, a policy similar to one adopted for broadcast/newspaper cross-ownership.[6] With respect to the five remaining cases that appear to be egregious, we temporarily deferred action until consideration of this petition.[7] Given the fundamental issues involved and the potential adverse effects on the public and system and station owners, we believed that additional inquiry and analysis was needed before further action could be taken. Accordingly, the effective date for the divestiture requirement was suspended pending action on the Marsh Media petition and Docket 20423 was terminated.[8]

5. We believe it is necessary to require divestiture in those situations where there would otherwise be a virtual monopoly over local expression.[9] Furthermore, we believe that this action is

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and Order, Docket 18397, 39 FCC 2d 377 (1973). In light of the many waiver petitions filed, the Commission instituted another rule making proceeding. *Notice of Proposed Rule Making*, Docket 20423, 52 FCC 2d 161 (1975). In a *First Report and Order*, Docket 20423, 53 FCC 2d 1102 (1975), the "egregious" only divestiture standard was adopted, effective August 10, 1977. Following a court challenge and a Commission-requested remand, a *Further Notice of Proposed Rule Making* in Docket 20423 was issued to examine the cross-ownership issue again. 81 FCC 2d 150 (1980). The result of this inquiry was the *Third Report and Order*, in Docket 20423, 49 FR 23348.

[6] The Commission adopted a divestiture requirement only for those broadcast station/newspaper cross-interests which were egregious and grandfathered other cross-ownership situations. *Second Report and Order*, Docket 18110, 50 FCC 2d 1046 (1975). Among the cross-interests grandfathered was Marsh's KVII-TV, Amarillo, Texas and Total Television of Amarillo, the cable system in that city in which Marsh has a 50 percent interest.

[7] The five remaining cases that appear to be egregious cross-ownership situations are listed in Appendix B.

[8] Marsh filed for reconsideration in Docket 20423. In that petition Marsh states that the Commission erred in terminating the proceeding without addressing the broader question of the validity of the cable/broadcast television cross-ownership prohibition. That issue is essentially resolved here. The reconsideration petition also requests a clarification as to the extent that Marsh's cross-interest is grandfathered. That issue will be dealt with separately.

[9] The Commission has asserted the importance of the independence of viewpoints in local media markets throughout the many analyses of its ownership rules. Cable television systems are an integral part of these local media markets. They are potentially influential sources of information concerning local issues along the broadcast stations and newspapers. Cable systems are significantly increasing the supply of programming and information available to the public through the carriage of satellite delivered news and other nonentertainment programming. We continue to believe in this context divestiture that is

consistent with the intent of Congress when it adopted the Cable Act. Section 613(f) of the Cable Act grandfathers interests held on July 1, 1984, if such interests were "not inconsistent with any applicable Federal or State law or regulation in effect on that date." The divestiture requirement for these egregious situations was part of the Commission's rules on July 1, 1984, although the effective date had been temporarily suspended. Accordingly, we will now terminate the stay of the divestiture rule and require divestiture of the five remaining cases the appear to be egregious cable/broadcast station cross-ownership situations within three years of adoption of this item (i.e., by November 8, 1987).[10]

Conclusion

6. The Commission's rule prohibiting common ownership of a cable television system and a co-located television station was codified in the Cable Communications Policy Act of 1984. As such, the Commission cannot repeal its rule. Therefore, Marsh Media's petition is effectively moot and must be denied. With respect to the existing cross-interests that appear to be egregious, divestiture is consistent with the Cable Act.

7. This action is taken pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

8. Accordingly, IT IS ORDERED that the request for rule making filed November 24, 1980, by Marsh Media, Ltd. IS DENIED.

9. ACCORDINGLY, IT IS ORDERED, that effective January 10, 1984, Part 76 of the Commission's Rules and Regulations is AMENDED as set forth in the attached Appendix C.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARIO, *Secretary*

*Appendix A-maybe seen in FCC's Dockets Branch, 1919 M Street, N.W., Wash., D.C.

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essential to ensure the diversity of editorial voices in these local media markets. We also note that the Commission recently reiterated this belief that local ownership rules must be maintained when it examined the multiple ownership rules for broadcast stations. *Report and Order*, Docket 83-1009, 49 FR 31877 (1984) at paras. 10, 12, 31 and 32. This is the standard adopted in both Docket 18110 and Docket 20423.

[10] With the resolution of this matter which was deferred to this proceeding in Docket 20423, the Commission now amends Section 76.501 to reflect this divestiture date. Textual changes to Section 76.501 to effectuate this requirement appear in Appendix C.

Appendix B

Egregious Cross-Owned Situations

Television Station	*Cable Television System*
KLOE-TV, Goodland, Kansas	Goodland, Kansas
WKYH-TV, Hazard, Kentucky	Hazard, Kentucky
KXGN-TV, Glendive, Montana	Glendive, Montana
KTEN, Ada, Oklahoma	Ada, Oklahoma
KSWO-TV, Lawton, Oklahoma	Lawton, Oklahoma

Appendix C

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 76.501 is amended by revising paragraph (b)(2) and by removing the note at the end of the section to read as follows:

§ 76.501 Cross-ownership.

* * * * *

(b) * * *

(2) The provisions of paragraph (a)(2) of this section are not effective until November 8, 1987, as to ownership interests proscribed herein if such interests were in existence on or before July 1, 1970 (e.g., if franchise were in existence on or before July 1970), and will be applied to cause divestiture as to ownership interests proscribed herein only where the cable system is, directly or indirectly, owned, operated, controlled by, or has an interest in a non-satellite television broadcast station which places a principal community contour encompassing the entire community and there is no other commercial non-satellite television broadcast station placing a principal community contour encompassing the entire community.

Cellular Communications System
Control, Transfer of
Mobile Radio Service

Application for transfer of control of cellular joint venture granted. The public interest in development of efficient and competitive cellular systems warranted approval of transfer of cellular partnership interests despite initial findings adverse to transferor's character in connection with a large number of paging applications. The likelihood that alleged misconduct would adversely affect operation of cellular facilities was not so substantial as to warrant deferral of transfer application. —*Cellular System One of Tulsa*

FCC 85-322

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
CELLULAR SYSTEM ONE OF TULSA	File No. 26492-CL-P-83
TULSA TELEPHONE COMPANY (TULSA CELLULAR TELEPHONE COMPANY)	File No. 26466-CL-P-83
For a construction permit to establish a new cellular system operating on Frequency Block A in the Domestic Public Land Mobile Radio Service to serve the Tulsa, Oklahoma Metropolitan Statistical Area (MSA)	
In re Application of	
TULSA CELLULAR TELEPHONE COMPANY	File No. 29152-CL-TC-85
For consent to Transfer of Control of Tulsa Cellular Telephone Company	

MEMORANDUM OPINION AND ORDER

Adopted June 18, 1985; Released June 21, 1985

BY THE COMMISSION:

I. Background

1. Cellular Mobile Services of Oklahoma, Inc. (CMSO)[1] and the ten other original mutually exclusive applicants for the Tulsa, Oklahoma non-wireline cellular system have filed a joint motion for approval of a full settlement agreement. Concurrent with the filing of the joint motion, Tulsa Cellular Telephone Company (TCTC), the partnership to be established by the proposed settlement agreement, has filed an application for Commission consent to a transfer of control of TCTC to Donrey Cellular Telecommunications (Donrey). Gencom Incorporated (Gencom), Radiofone, Inc. (Radiofone) and RAM Broadcasting Corporation (RAM) have filed a joint comment on the transfer application[2] and TCTC has filed a reply.

2. The full settlement agreement proposes to establish a general partnership to be named Tulsa Cellular Telephone Company to construct and operate a non-wireline cellular system in the Tulsa, Oklahoma market. The ownership interests in the partnership are as follows:

CMSO	45.5%
McCaw Communications of Tulsa, Inc.	9.09%
Metro Mobile CTS (Metro Mobile)	9.09%
Mid-America Cellular Systems, Inc. (MACS)	18.18%
Tulsa Cellular Telephone Company	9.09%
Donrey[3]	9.09%

The remaining applicants will not participate in the partnership and have agreed to dismiss their applications in consideration of settlement agreements in other markets. The applicants have designated the original application of MACS (now the application of the TCTC as a result of a partial settlement) as the surviving

[1] CMSO is a subsidiary of Cellular Mobile Systems, Inc. (CMS). CMS is a wholly-owned subsidiary of Graphic Scanning Corp. (Graphic).

[2] A comment was also originally filed by United States Cellular Telephone Company, the wireline cellular permittee in the Tulsa market, but was subsequently withdrawn.

[3] Donrey is not an original applicant, but acquired its interest from Trans-Cell of Tulsa.

application and have requested the dismissal of the remaining application of Cellular System One.[4]

3. The application for consent to transfer of control concerns the proposed acquisition of the partnership interests of both CMS and Metro Mobile by Donrey. The proposed transaction will vest Donrey with a 63.63% controlling interest in TCTC.

4. In their joint comments on the transfer application, Gencom, Radiofone and RAM do not oppose the application, but urge the Commission make clear that it does not intend to establish a precedent for the approval of a sale for profit of an ownership interest held by a Graphic Scanning Corporation subsidiary outside the context of a cellular settlement process. The joint commentors note that the Administrative Law Judge (ALJ) found that CMS' corporate parent, Graphic, had "exhibited a lack of candor and, on occasions, intentionally misrepresented material facts to the Commission." *A.S.D. Answer Service, Inc. (A.S.D. Initial Decision)*, FCC 85D-3, released January 9, 1985, Conclusions, para. 41. The parties argue that absent the strong public interest considerations favoring cellular settlements, the approval of the sale of an interest held by any Graphic subsidiary would violate the Commission's long-standing policy against approval of any assignment or transfer of any interest in a license where unresolved character issues are pending against the licensee. In its reply comments, TCTC notes that the joint commentors do not oppose grant of the application and argues that the concern over the possible precedential effect of Commission approval of the transfer on unspecified future non-cellular transactions presents no bar to the immediate approval of the present transfer of control application. TCTC further contends that any action against a Graphic interest prior to a final determination in the *A.S.D.* proceeding would be premature.

II. The Settlement Agreement

5. The settlement agreement proposes to establish a partnership in which CMS will hold the largest voting interest. The findings of lack of candor and misrepresentation upon the part of Graphic in the *A.S.D. Initial Decision* raise a substantial issue with respect to CMS' qualifications to remain a Commission

[4] The eleven original applicants reached two partial settlements, resulting in the two captioned applications, as amended. The nine other applications have previously been dismissed. Public Notice, Report No. CL-108, September 10, 1984.

licensee. In approving cellular settlements in other markets, we have conditioned any authorization to a partnership in which CMS holds an interest upon a reexamination of CMS' qualifications to hold a Commission license following a final determination in the *A.S.D.* proceeding. *See Cellular Mobile Systems of Indiana, Inc.*, 93 FCC 2d 26, 30 (1983). We find that the settlement agreement raises no other substantial or material issues requiring our scrutiny and we therefore conclude that approval of the settlement agreement, conditioned on the *A.S.D.* proceeding, is in the public interest. We further conclude that a grant of TCTC's application, subject to the usual *A.S.D.* condition in the event the transfer approved below is not consummated, will best serve the public interest, convenience and necessity. We have determined, moreover, that the transfer of control application concurrently before us presents an appropriate vehicle for addressing the effect of the ongoing *A.S.D.* proceeding on the transferability of CMS' cellular interests.

III. The Transfer of Control

6. The application for transfer of control concerns the proposed acquisition by Donrey of CMS' and Metro Mobile's interests in TCTC. In the *A.S.D. Initial Decision*, the ALJ found that Graphic lacked candor and had deliberately misrepresented material facts to the Commission. Those adverse findings, which are subject to Commission review on pending exceptions, place CMS' character in issue and require us to address the question of whether, in light of the pending unresolved character issues, the transfer of CMS' partnership interest is consonant with the public interest. After a careful review of the application and related pleadings as well as the relevant precedent, we conclude that the public interest will best be served by approval of the transfer.

7. Section 310(d) of the Communications Act requires the Commission to find a transfer of control of a corporation holding a license or construction permit to be in the public interest before approving the transfer. Commission decisions in the broadcast area have established that the Commission, consistent with its Section 310(d) obligations, will ordinarily defer consideration of any transfer application until any outstanding character qualification issues against the transferor are resolved. *See, e.g., Jefferson Radio Company, Inc. v. FCC*, 340 F 2d 781 (1974); *RKO General, Inc.*, 82 FCC 2d 291, 301-02 (1980), *affirmed in part, reversed in part* 685 F.2d 708 (D.C. Cir. 1982); *Cablecom-General, Inc.*, 87

FCC 2d 784, 786 (1981). To permit a licensee to sell out from under a potential disqualification would significantly impair the Commission's ability to police and deter licensee misconduct. *See Pass Word, Inc.*, 76 FCC 2d 465, 516 (1980), *reconsideration*, 86 FCC 2d 437 (1981), *aff'd sub nom., Pass Word, Inc. v. FCC*, 673 F.2d 1363 (D.C. Cir. 1982). The Commission has created exceptions to this policy in the broadcast context that are not applicable here.[5] The application of this deferment policy to a proposed transfer of licenses which are held by a multiple licensee that has engaged in serious misconduct, but that are not themselves implicated in the disqualifying conduct, requires a second level of inquiry. The imposition of restrictions on the transfer of such uninvolved licenses turns upon a careful balancing of competing public interest considerations, and even the designation of misrepresentation and lack of candor issues against a multiple licensee does not necessarily trigger a restriction on transfers.

8. In *Grayson Enterprises, Inc.*, 79 FCC 2d 936 (1980), the Commission addressed the question of the effect of a multiple licensee's alleged misconduct in connection with one or more licenses on the transferability of its other licenses not directly implicated in the allegations of misconduct. *Grayson* recognized that deferral of all action on all of the licenses held by a multiple licensee pending a final resolution of character issues raised by alleged misconduct may operate to the detriment of the public interest. *Id.* at 939. The Commission held that in such circumstances, the public interest would best be served by a preliminary determination as to the transferability of the licensee's nondesignated licenses and applications. The Commission therefore adopted a procedure whereby at the time of designating a basic character issue in connection with one or more of a multiple licensee's licenses or applications, the Commission would make a preliminary determination as to impact of the alleged misconduct on the transferability of the licensee's other licenses. This *Grayson* inquiry turns upon a balancing of the public interest consider-

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[5] *See, e.g.*, Cathryn Murphy, 42 FCC 2d 346 (1973) (transferor seriously ill); Second Thursday Corp., 25 FCC 2d 112 (1970) (bankrupt licensee effects sale for benefit of innocent creditors while assuring alleged wrongdoers will derive no benefit); Stereo Broadcasters, Inc., 74 FCC 2d 543 (1979), *aff'd* Stereo Broadcasters, Inc. v. FCC, 652 F 2d 1026 (D.C. Cir. 1981) (distress sale policy); Teleprompter Cable Systems, Inc., 40 FCC 2d 1027 (1973) (licensee moves swiftly to purge itself of wrongdoers); Mutual Radio of Chicago, Inc., 55 RR 2d 1577 (1984), appeal pending *sub nom.* Martina Trigona v. FCC, D.C. Cir. No. 84-1229 (assignor's alleged misconduct is non-broadcast related and licensee's broadcast record is exemplary).

ations favoring the free transferability of the licensee's interest against the Commission's long-term interest in deterrence to determine whether, on the whole, the public interest weighs in favor of free transferability. *See Grayson*, 79 FCC 2d at 939; *Cablecom-General*, 87 FCC 2d 784.

9. The present application, involving a substantial CMS cellular interest subject to an *A.S.D.* condition, raises the same concerns and considerations relevant to a *Grayson* inquiry. Accordingly, we view this application as representing the appropriate juncture to undertake a *Grayson*-type inquiry to determine whether CMS should be permitted to transfer its cellular interests free of any condition or encumbrance.

10. Applying the *Grayson* analysis to this case, we note that the conduct which concerns the Commission in *A.S.D.* was limited to radio paging services. It did not involve cellular radio, a service whose exceptional importance has been recognized repeatedly by the Commission. *See, e.g., Cellular Communications Systems*, 86 FCC 2d 469, 489-90 (1981). Moreover, given the importance which we attach to the effectuation of cellular service, we have already held that cellular proceedings involving Graphic subsidiaries would not be delayed pending the outcome of the *A.S.D.* case. *Advanced Mobile Phone Service, Inc.*, 91 FCC 2d 512 (1982). Similarly, we have determined that the settlements of cellular proceedings promote the public interest in the orderly construction and development of cellular systems. *Cellular Lottery Rulemaking*, 98 FCC 2d 175, 217 n.113 (1984), reconsideration, FCC 85-117, released May 3, 1985. A flat restriction on the transfer of CMS' cellular interests pending a final resolution in *A.S.D.* in circumstances where CMS no longer intends to engage in the provision of cellular service or is financially unable to bear the large capital costs associated with the initiation of cellular service would substantially frustrate the consolidation of joint venture interests into efficient entrepreneurial enterprises. Conditioning the transfer of CMS' interests on the final outcome of the *A.S.D.* proceeding would subject the proposed transferee to a high degree of risk and uncertainty and would have substantially the same adverse impact on the public interest as a flat restriction on transfers. Thus, the imposition of restrictions or conditions on the transfer of CMS' interests threatens to frustrate the public interest in the development of efficient and competitive cellular systems. Balancing these public interest considerations favoring the rationalization and realignment of cellular interests (to promote efficient operation and effective competition) against our

interest in deterrence in connection with the allegations of misconduct in *A.S.D.*, we find that the interest in deterrence is outweighed by the more immediate and substantial public interest in the development of efficient and competitive cellular systems. In this connection, we note that subordinating our interest in deterring misconduct to more immediate public interest considerations in connection with CMS' cellular interests does not impair our ability to take action against Graphic: Graphic's extensive non-cellular holdings afford ample opportunity for the imposition of suitable sanctions should the final outcome in *A.S.D.* warrant such action.[6]

11. We emphasize the limited scope of our decision here: we address only the transferability of CMS' cellular interests. Our action does not extend to Graphic's paging or two-way interests which remain subject to further action, should it be warranted as a result of *A.S.D.* In addition, this order does not in any way address the matters under review in connection with the exceptions in the *A.S.D.* case.

IV. Ordering Clauses

12. Accordingly, IT IS ORDERED, that the application of Tulsa Cellular Telephone Company, File No. 26466-CL-P-85, IS GRANTED,[7] and the application of Cellular System One of Tulsa, File No. 26492-CL-P-83, IS DISMISSED.

13. IT IS FURTHER ORDERED, that the application for consent to transfer of control filed by Tulsa Cellular Telephone Company, File No. 29152-CL-TC-85, IS GRANTED.[8]

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[6] Consistent with the general approach of Grayson, the Commission retains the discretion to take action against those cellular interests retained by CMS at a later date should such action prove warranted in light of the final decision in the A.S.D. proceeding.

[7] This grant is conditioned upon TCTC obtaining appropriate antenna structure clearances. In the event TCTC does not consummate the transfer of control approved in application File No. 29152-CL-TC-85, this grant is further subject to the following condition: the participation by CMS in this authorization should be conditioned on, and without prejudice to, reexamination and reconsideration of that company's qualifications to hold a cellular license following a decision in the hearing designated in *A.S.D. Answering Service*, FCC 82-391, released August 24, 1982.

[8] The Common Carrier Bureau, with the exception of the Separated Trial Staff, has functioned in a decision-making capacity in the A.S.D. case. *See* Charisma Communications Corp. of the Southwest, FCC 85-278, released May 24, 1985, at n.5.

Abeyance
Female Ownership-Participation
Ownership and Management, Integration of
Partnership Agreement

Review Board holds in abeyance a comparative FM case before it on exceptions. The case may well turn on the manner in which the "spousal attribution" doctrine applies to the integration of ownership and management factor, an issue that is centrally before the Commission on remand in *Ventura B/cing Co.* v. *FCC*, No. 83-2167 (D.C. Cir. June 19, 1985).
—*Chester Associates*
MM Docket No. 84-525

FCC 85R-71

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Giraud Chester & Marjorie F. Chester d/b/a CHESTER ASSOCIATES East Hampton, New York	MM Docket No. 84-525 File No. BPH-830318AC
JOHN F. SHEA, III East Hampton, New York	MM Docket No. 84-526 File No. BPH-830321AL
For Construction Permit for a New FM Station	

MEMORANDUM OPINION AND ORDER

Adopted: August 20, 1985; Released: August 28, 1985

BY THE REVIEW BOARD:

1. The Board has before it the exceptions and responsive pleadings in the above-styled case; it also held oral argument on the case on July 12, 1985.

2. From the briefs and oral argument, it is apparent that this case may well turn on the question of whether to award Chester Associates ("Chester") a 100% fulltime quantitative integration factor,[1] enhanced, *pro tanto*, by female ownership, or whether that award should be reduced to Mrs. Chester's 65% *de jure* ownership share, her husband—Giraud Chester—owning the remaining 35% of the Chester equity.

3. Chester bases it 100% integration claim essentially on a two-page document styled "Certiciate of Limited Partnership" it filed at the "B" cut-off deadline.[2] The two-page "certificate" purports to incorporate by reference the Uniform Limited Partnership Act, *see* East Hampton Exh. 4, but contains no provisions relating to such matters as voting powers or admission of additional general partners. Nor does it provide—for example—"that the . . . limited partner cannot act as an employee of the limited partnership if his or her functions, directly or indirectly, relate to the media enterprises of the company"[3] or bar the "limited partner . . . from becoming actively involved in the management or operation of the media businesses of the partnership."[4] They are merely illustrative of the prophylactic provisions the Commission will now demand to delimit a limited partner's ownership interest in *ordinary* circumstances, the Uniform Limited Partnership Act "not provid[ing] meaningful assurance that the limited partner will lack the ability to significantly influence or control partnership affairs."[5] In the instance of marital partners, the Commission has now held that, where limited partnerships contain all of the requisite insulative provisions (over and above the Uniform Limited Partnership Act), the Commission

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[1] The presiding ALJ made such an award. *See Initial Decision* ("*I.D.*"), FCC 85D-9, released Febraury 5, 1985, at Concls. para. 10.

[2] Shea Exceptions at 6. The Chester amendment is fully permissible under our procedural rules; the question—as will be seen—is its substantive value.

[3] *See Reexamination of Commission's Rules and Policies Regarding Attribution of Ownership* (Docket No. 83-46), 58 RR 2d 604, 619 (1985) (footnotes omitted).

[4] *Id.*, at 620 (footnote omitted).

[5] *Id.*, at 616.

will—"on a case-by-case basis, in appropriate circumstances"—permit the couple to attempt to rebut the "nearly conclusive" presumption of co-control embodied in the "spousal attribution" doctrine.[6] [7] Chester's "certificate" does not comply in any major respect with the insulative provisions required in the recent *Attribution of Ownership* statement (*supra* note 3). At best, it purports to incorporate by reference the entire Uniform Limited Partnership Act, the provisions of which the Commission has expressly found inadequate for its prophylatic purposes, *see id.* at 616-618, especially where marital partners are attempting to rebut the general "spousal attribution" doctrine. *See id.*, at 620.[8] But, over and above the foregoing, our concern about the present and future efficacy of the Chesters' arrangements is heightened by the particular circumstances in this case. The record, without dispute, reflects that Mr. and Mrs. Chester filed the application as general partners, and, thus, that reflected the intention of the Chesters until the "B" cut-off date. In that regard, it is asserted[9]:

> 14. While still a *general partner*, Mr. Chester signed all amendments to the Associates application until the "B" cut-off date (Tr. 46, 47), at which time the Associates general partnership was transformed to a *limited partnership*. Shea respectfully requests that the Review Board take official notice of the amendments to the Associates application dated April 25,

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[6] *Id.*, at 620. This doctrine is articulated in *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 425-427 (1981), and discussed recently by the Board in *Cannon Communications Corp.*, FCC 85R-59, released July 30, 1985, at paras. 10-12.

[7] The Commission's "spousal attribution" doctrine, and its circumspection in accepting attempted rebuttals thereof in the case of marital limited partnerships, appears to be a prudence well justified. For the Commission has established a sexual preference policy favoring female ownership of stations. *See Cannon's Point Broadcasting*, 93 FCC 2d 643, 651-653 (Rev. Bd. 1983), *recon. denied*, 94 FCC 2d 72, *review denied*, FCC 84-161, released April 13, 1984, *appeal pending sub nom. Steele* v. *FCC*, No. 84-1176 (D.C. Cir.) (argued April 1, 1985). Because of the importance of sexual preference policy in licensing determinations, *see, e.g., Cannon's Point*, and because of the potential for abuse of the limited partnership device noted by the Commission in connection with special sexual and racial preferences, *see Minority Ownership in Broadcasting*, 92 FCC 2d 849, 855 (1982), the Board has followed the Commission's instructions and very carefully reviewed relevant situations. *See KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984) (applications for review pending).

[8] We recognize that Chester could not have foreseen the "tightening-up" of the limited partnership requirements at the time it filed its application amendment. We also realize that the Commission's recent limited partnership focus was on attribution of ownership, not integration. But, (1) the Commission's focus has some applicability here because Mr. Chester has a minor interest in Mohawk Broadcasting. Ltd., Shea Exceptions at 13, and (2) the Board does pay special attention to the Commission's most recent policy views, particularly where precedent is thin. *See, e.g., Horne Industries*, 94 FCC 2d 815, 822 *et seq.* (Rev. Bd. 1983), *modified*, 98 FCC 2d 601 (1984) (Comm'n).

[9] Shea Exceptions at 6-7.

1983 and June 17, 1983, both of which are signed by Giraud Chester as general partner.

15. Although nothing precludes a pre-"B" cut-off date attempt like that of Associates to upgrade an application from a comparative standpoint and although applicants can amend their proposals as a matter of right until the "B" cut-off date, 47 C.F.R. Section 73.3322(a), when an applicant amends in order to seek a preference in a comparative hearing on the integration criterion, its proposal cannot be a mere facade. *Berryville Broadcasting Co.*, 70 FCC 2d 1, 7 (Rev. Bd. 1978).

Furthermore, Mrs. Chester testified that the "B" cut-off date amendment to a limited partnership was made, at least in part, because "our lawyers suggested it . . . ,"[10] and [11]:

> They said, 'Your application might be enhanced by the fact that you are a woman. There will be 100% integration.'

4. These circumstances ineluctably raise the question of whether the purported limited partnership arrangement between the Chesters should be given full efficacy, at the probable cost of the license to Shea, or whether the two-page agreement should be regarded as a formalistic legal ploy signifying no *de facto* control change as between the martial partners.[12] Recognizing the obvious potential for abuse inherent in permitting sexual and racial preferences on the basis of limited partnership arrangements, the Commission's order allowing such devices expressly warned "that in order to avoid 'sham' arrangments," it would closely scrutinize such limited partnerships on a case-by-case basis. *Minority Ownership in Broadcasting*, 92 FCC 2d 849, 855 (1982). Perforce, in going so far as to allow the use of the limited partnership device to help rebut the "spousal attribution" doctrine in *Attribu-*

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[10] Tr. at 53.

[11] *Id.* at 52. In addition to possibly garnering a 100% integration factor, enhanced by female ownership, Mrs. Chester also testified that the limited partership amendment was motivated by a change in her husband's attitude towards his employment contract. *See id.* Some might question this latter claim, inasmuch as Mrs. Chester was always proposed as the 65% majority partner, and Mr. Chester's role at the proposed station—if the *de jure* Chester partnership interests meant anything—was always purported to be a very "limited" one. Thus, it could be inferred that the *formal* change as between the Chesters had only one purpose: integration enhancement.

[12] Although the Commission often looks to financial control of an entity to help determine *de facto* control, *see Ventura Broadcasting Co.* v. *FCC*, No. 83-2167 (D.C. Cir. decided June 18, 1985), slip op. at 14 n. 6, water is here muddy because:

> Although at one point Ms. Chester testified that a verbal agreement existed between the Chesters as to finances (Tr. 83), she later testified that there were no other understandings or agreements between the partners (Tr. 84).

Shea Exceptions at 9.

tion of Ownership (*see supra* para. 3), the Commission again demanded a close "case-by-case" scrutiny.

5. This case, then, presents the Board with difficult factual questions and, as discussed below, the record in this proceeding may be insuffient to provide confident answers. However, these questions could become moot, depending upon the Commission's reaction to the court's remand in *Ventura Broadcasting Co.* v. *FCC*, *supra* note 12. By way of background, we note that, relying on the Commission's edict in *Alexander S. Klein, Jr.*, *supra* note 6, that it would not accept "a disclaimer of active interest or participation in a commonly-owned entity . . . ",[13] and also upon the precedent of *East St. Louis Broadcasting Co.*, 19 FCC 2d 300, 346 (Hearing Ex. 1969), *aff'd*, 29 FCC 2d 1970 (1971), the Board determined that it would accord the fulltime integrated spouse his or her marital partner's ownership interest on the assumption that the integrated partner would be acting for the entire marital entity. *See Absolutely Great Radio, Inc.*, 92 FCC 2d 1171 (Rev. Bd. 1983). Disagreeing with the Board, the Commission determined that one spouse could claim the marital partner's equity interest for integration purposes only upon evidentiary proof of passivity on the part of the unintegrated spouse. *See* 95 FCC 2d 1023 (1983) (Commission decision). The case is back before the Commission pursuant to the remand in *Ventura Broadcasting*, *supra*.

6. Without suggesting, one way or another, what the Commission should do upon the *Ventura Broadcasting* remand, we cannot avoid observing that, should the Commission decide to return to the *East St. Louis* approach, Mrs. Chester might be entitled to a 100% integration credit by operation of law.[14] On the other hand, should the Commission again determine to hinge attributed spousal integration credit upon satisfactory evidence of one spouse's passivity, *see* 95 FCC 2d at 1028, the record here is troublesome since the ALJ not only ruled out discovery on the Chesters' partnership arrangment,[15] he rejected Shea's request to

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[13] 86 FCC 2d at 426. *But see supra* para. 3, discussing limited partnerships as between married persons.

[14] We do not doubt that Shea would rejoin that Chester should get *no* credit, based on its view that that applicant attempted to perpetrate a fraud on the Commission with a sham limited partnership. *See* Shea Exceptions *passim*.

[15] *See Order Prior to Prehearing Conference*, FCC 84M-3088, released July 13, 1984, at para. 6. Shea asserts that this ruling was arbitrary because, in a subsequent case, this same ALJ permitted broad discovery of limited partnerships, and stated in the subsequent case "that the presiding officer employed a different approach in *East Hampton* . . . ." *See* Tr. of Oral Argument at 369 (*quoting Harmony Broadcasting Corp.*, FCC 85M-1380, released April 2, 1985,

make Mr. Chester a witness in this case.[16] Whether the ALJ's rulings were correct or incorrect in these instances,[17] the record on the point is rather anemic. For example, whereas the Commission's decision in *Absolutely Great Radio* directed that one spouse may attempt to claim the other's equity interest for integration purposes upon a satisfactory evidentiary showing that the unintegrated spouse will remain absolutely passive and never attempt to exert influence over operational matters, Mr. Chester has not even testified, let alone demonstrated by substantial evidence that he will remain completely passive. And, without convincing proof, some might doubt that Mr. Chester, with a lifetime experience in broadcasting while his wife has none, would exert no influence over the station's operations, even if—for example—the nascent station were foundering under this wife's aegis, and intervention could save the bacon for the marital partners.

7. Because the Commission's response to the court's *Ventura Broadcasting* remand may either moot or clarify on vicarious integration credit as between spouses, we believe that comity,

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at para. 5). Whether *Harmony* can be distinguished, or whether the ALJ arbitrarily changed his mind, need not be decided at this point. We note that the ALJ himself stated in *Harmony* that:

> Ruling
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> 3. . . . We've been having more than our share of adjudicatory problems with limited partnership applicants. Many of the limited partnerships are *bona fides*, many are not. See e.g. *KIST*, 47 RR 2d 49, 60-63 (Rev. Bd. 1984). In fact in this very proceeding a serious question has been raised regarding the *bona fides* of one of the limited partnerships (FCC 85M-1355, released April 1, 1985).
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> 4. Under these circumstances the Presiding Officer will exercise his discretion in favor of deposing limited partners. We have several such partnerships involved in this case. Let's subject them to the crucible of discovery. That preliminary approach should conduce to the more orderly trial of this large multi-applicant proceedings.
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> 5. It's true that the Presiding Officer employed a different approach in *East Hampton, supra.* But that was a small three party proceeding, and 65% of the partnership's equity was held by the General Partner.

FCC 85M-1380, at paras. 3-5.

[16] The fault here, if any, lies as much with Shea, since the ALJ's denial expressly invited Shea to renew its request for Mr. Chester's testimony, *see Memorandum Opinion and Order*, FCC 84M-4660, released November 2, 1984, at n. 1; but Shea did not renew its request. Tr. of Oral Arg. at 375-379.

[17] As the Board recently indicated, it does not condone "indiscriminate inquires lacking a *prima facie* basis" when considering discovery requests anent limited partnerships. *Houston Family Television, Ltd.*, FCC 85R-56, released July 10, 1985, at para. 20. However, when *prima facie* evidence indicates that such arrangmenets may lack real substance, an appropriate issue should be added and discovery permitted. *See generally KIST Corp., supra* note 7.

courtesy, and common sense dictate that the Board not step again into this sensitive policy area prior to Commission consideration of the matter. Consequently, we will hold this case in abeyance until the Commission acts on the court's remand order. While we regret the delay, we find that one alternative here—certification of the matter to the full Commission—would achieve no greater expedition, it being a certainty that the Commission would not address the certification prior to responding to the *Ventura Broadcasting* court. And, to the extent that the Commission's response might moot any key legal issues or obviate a possible remand here to amplify the facts, administrative efficiency is far better served by our instant action.[18]

8. ACCORDINGLY, IT IS ORDERED, That this proceeding IS HELD IN ABEYANCE as indicated in paragraph 7, *supra*.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

[18] As to delay, we comment that we have withheld issuing this order while the parties were attempting to negotiate a settlement. *See* Letters of Counsel of July 26, 1985 and August 7, 1985, respectively. We would hope that the two remaining parties would continue their settlement discussions during the abeyance period.

FCC 85D-9

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
East Hampton Broadcasting Co., Inc. East Hampton, New York	MM Docket No. 84-524 File No. BPH-821028AP
Giraud Chester & Marjorie F. Chester d/b/a Chester Associates East Hampton, New York	MM Docket No. 84-525 File No. BPH-830318AC
John F. Shea, III East Hampton, New York	MM Docket No. 84-526 File No. BPH-830321AL
For Construction Permit for a New FM Station	

Appearances

Lawrence N. Cohn on behalf of East Hampton Broadcasting Co., Inc.; *Jerome S. Silber* and *Jerome S. Boros* on behalf of Giraud Chester and Marjorie F. Chester, d/b/a Chester Associates; and *Stephen Diaz Gavin, Kristi L. Kendall* and *Thomas L. Siebert* on behalf of John F. Shea, III.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
WALTER C. MILLER

Issued: January 30, 1985; Released: February 5, 1985

Preliminary Statement

1. Three mutually-exclusive applicants seek authority to construct and operate a new FM station on 96.7 MHz, Channel 244A, at East Hampton, New York: East Hampton Broadcasting Co., Inc. (EHB), Chester Associates (Chester) and John F. Shea, III (Shea).

2. The Chief, Audio Services Division designated those three applications for hearing on June 11, 1984. See 49 F.R. 23451 published June 6, 1984. The only factual issue that needed to be resolved was the standard comparative issue. That issue and the ultimate issue reads as follows:[1]

> "1. To determine which of the proposals would, on a comparative basis, best serve the public interest; and
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> 2. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any."[2]

3. We held the prehearing conference on October 2, 1984, and the hearing sessions on November 6 and 8, 1984. The record was closed on November 8, 1984. The three applicants filed their Proposed Findings of Fact and Conclusions of Law on January 8, 1985. Chester and Shea filed Reply Findings on March 25, 1985. EHB elected not to file a Reply.

Issue 1–The Standard Comparative Issue

Description of the Applicants

4. *East Hampton Broadcasting Co., Inc.*, EHB is a New York corporation. It has two stockholders: Leonard I. Ackerman–President, Treasurer, Director and 65% stockholder; and Barbara Brannen–Vice-President, Secretary, Director and 35% stockholder.[4]

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[1] The issues have been renumbered to conform to rulings made during the proceeding.

[2] The Presiding Officer fails to understand the significance of the words "if any." Certainly the Chief never framed any basic qualifying issues against either EHB or Chester.

[3] Apparently fearing the Review Board's recent pronouncements in *KIST, Corp.*, 57 RR 2d 49 (1984), EHB devotes several pages of its conclusions (Conclusions paras. 4–10) to arguing its *bona fides*. It needn't fear. The record shows it is a *bona fide* corporation with the structure described above.

5. *Giraud Chester & Marjorie Chester d/b/a Chester Associates.* Chester is a limited partnership organized under the laws of New York State.[4] Marjorie Chester owns 65% of the Partnership and is its sole General Partner. Mrs. Chester's husband, Giraud Chester, owns 35% of the Partnership and is a Limited Partner.

6. *John F. Shea, III.* Shea is prosecuting BPH-830321AL as a sole proprietor. He is the 100% owner.

Diversification of Mass Media

7. *EHB.* Neither EHB nor Ms. Brannen have any broadcast or mass media interests. However, EHB principal Leonard Ackerman is President, a Director, and 80% stockholder of WMLB, Inc., licensee of Station WMLB, West Hartford, Connecticut. West Hartford is about 50 miles from East Hampton. See Chester PF 14.

8. *Chester Associates and Shea.* Neither Chester nor Shea hold any cognizable media interests.[5]

Integration of Ownership With Management

9. *EHB.* Quantitatively EHB claims 65% part-time and 35% full-time integration of ownership with management. It intends to integrate its majority (65%) stockholder into its day-to-day operation on a part-time basis, and its minority (35%) stockholder on a full-time basis.

10. First, EHB intends to integrate its President, Treasurer, Director, and 65% stockholder *Leonard Ackerman*, into its proposed day-to-day operations, 20 hours a week. Ackerman would be the station's part-time Sales Manager.[6] In that capacity he will plan, implement, and evaluate the station's sales efforts.[7]

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[4] Chester's counsel was alerted to the fact that the Commission's Processing Lines have been receiving both ersatz as well as legitimate limited partnership applications (Tr. 16-17). Consequently, and prior to hearing (Tr. 81), he made a copy of Chester's Certificate of Limited Partnership available to his opponents. A review of that Certificate along with the testimony adduced at the hearing clearly shows that the Chester Associates Limited Partnership is legitimate. See e.g. EHB Ex. 4, and Tr. 81-82.

[5] Giraud Chester, Associates' limited partner, hold a 2.6% limited partnership interest in the licensee of UHF Television Station WPMT (TV), York, Pennsylvania.

[6] EHB will hire a full-time General Manager as the Station's chief operating executive.

[7] In addition to being Sales Manager, Ackerman will spend part of his 20 hours soliciting advertising himself (Tr. 259-260).

He has lived in East Hampton for the past 11 years.

11. Leonard Ackerman is a practicing part-time attorney and an investor and developer of commercial property in the East Hampton area. He has no past broadcast experience, and although he has never sold time for a radio station, he has sold coops and boat slips.

12. Civically, Ackerman is a member and on the Board of Trustees of the Jewish Center of the Hamptons from 1974 to the present time; he was Special Counsel for the Town of East Hampton from 1981 to 1982, and was Counsel for the East Hampton Union Free School District from 1974–1975.[8]

13. A white, non-Hispanic, male, Ackerman makes no enhancement claim.

14. Next, EHB intends to fully integrate its Vice-President, Secretary, Director and 35% stockholder, *Barbara Brannen* into the station's proposed day-to-day operations. Ms. Brannen will put in at least 40 hours a week as the Public Affairs Director and the Community Relations Director/Liaison. In that capacity she will be responsible for the station's public affairs programming; she will be the station's liaison with women's and minority groups; and she will moderate one locally produced public affairs program per week devoted to issues of local concern. Ms. Brannen has resided in Sag Harbor, New York for the past 8 years. Sag Harbor is about 3⅓ miles from the Village of East Hampton.

15. Barbara Brannen has her doctorate degree. She is a social worker, and has taught at South Hampton College. She is currently the Executive Director of a daycare center in Bridge Hampton.

16. Ms. Brannen does have some past broadcast experience. From 1969–1975 she ws the Director of the Multi-Service Center for the Bedford Stuyvesant Community Corporation. There she worked with the Corporation's non-commercial FM station about 15 hours a week. She discussed with the person in charge of the station who the speakers would be and what subjects would be discussed. She was also an on-the-air personality on the Multi-Service Center's program, a program broadcast every evening from 6 to 9 p.m.[9]

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[8] Ackerman has not been credited for either his New York City civic endeavors, or for East Hampton civic activities he joined after he filed his application in this proceeding on October 28, 1982.

[9] Ms. Brannen claims she won't be selling commercial time (Tr. 314). But the majority stockholder, Leonard Ackerman, says she will (Tr. 259–260). In addition, Ms. Brannen is laboring under the misapprehension that Ackerman is going to be the Station's General Manager. She didn't know that Ackerman

17. Barbara Brannen has been and still is civically active. She is or was on the Board of Directors of Boys Harbor, Inc.; she is Public Relations chairperson and officer of the Columbiettes, an organization for Catholic women in the East Hampton area; she is a Trustee and Vice-President of the John Jermain Library in Sag Harbor; in the NAACP, she is Public Relations chairperson for the East End Education Committee; she is a Trustee for the Council of Substance Awareness, Southampton Town College; and she is the Public Relations chairperson, past president, and present Financial Officer for the Ninevah Beach Property Owners Association.

18. Ms. Brannen claims qualitative integration enhancement because she is a black female.

19. *Chester Associates.* Chester claims 100% quantitative integration credit. It intends to fully integrate its 65% sole General Partner *Marjorie Chester* into the proposed station's day-to-day operations. Mrs. Chester will work a minimum of 40 hours a week as General Manager of the station. As General Manager, she will supervise the station's operations. She will oversee construction and regulatory compliance, hire and supervise the staff, develop programming concepts, and deal with advertising representatives. She has resided in East Hampton Village for the past eight years.

20. After graduating from high school Marjorie Chester attended Smith College, and graduated from Barnard College with a BA in 1954. While she was at Smith she participated in the college's radio station operation; she produced a one hour classical music program.

21. Mrs. Chester is a professional writer. From 1955 to 1959 she was an assistant and associate editor for *Good Housekeeping Magazine.* Then from 1959–1962 she was an associate editor of *McCall's Magazine.* She wrote articles for *McCall's* under her own name as well as under a variety of pseudonyms. She also wrote a full-length book entitled "*McCall's* Book of Fund Raising Ideas." It was published by Prentice-Hall.

22. She dropped out of the job market to raise two children (who are now 19 and 21 years old). During that time period she attended Hunter College for 2 years and Columbia University for an additional 3 years to study the Chinese language. In 1978 she

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was going to hire a General Manager that would supervise the station's operations. She thought that she and Ackerman would be the station's management team (Tr. 334–336, 339).

taught English to Chinese-speaking people at the Church of the Transfiguration in New York City.

23. Mrs. Chester has resumed professional writing on a free-lance basis; she has had several feature articles published in *The New York Times*, and has contributed a number of articles to the *East Hampton Star*.

24. She has had some broadcast experience. In the autumn of 1983, she studied radio station management at Hunter College. In the 1970s, she aired some public service announcements over WMCA, New York City, and in 1984, she studied various station operations at Station WRCN-FM, Riverhead, New York. But she has had no broadcast management experience.

25. Mrs. Chester has been civically active in East Hampton. She has been a member of the Ladies Village Improvement Society in East Hampton since 1970 and Chairperson of the Flag Committee since 1978. Since the 1970s, she has been an active member of and a donor to Guild Hall, East Hampton's cultural center, and a member of the East Hampton Historical Society, a Society devoted to preserving East Hampton's historical sites. Mrs. Chester is also a donor to the East Hampton Free Library.

26. Marjorie Chester claims qualitative integration enhancement because she is a female.

27. *John F. Shea, III.* Shea claims 100% full-time quantitative integration. As an individual applicant Shea intends to devote a minimum of 40 hours per week to being General Manager of the Station. In that role, he will make the primary and ultimate day-to-day operating decisions, decisions that will affect day-to-day news, public affairs, entertainment and non-entertainment programming. Shea will define and implement station policy, hire and fire both the administrative and managerial staff, purchase equipment and services, and implement the equal opportunity program.[10] Shea has resided in East Hampton for about three years.[11]

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[10] Chester Associates has attacked John Shea's 40-hour a week integration pledge claiming that, as a practicing attorney, Shea can't maintain his professional legal responsibilities and also meet his 40-hour a week commitment. Those attacks are rejected (Tr. 122–149).

[11] Prior to relocating in East Hampton, Shea resided in Washington, D. C. In June 1981 he learned that FM Channel 244A was to be allocated to East Hampton. This was one of the factors that caused him to relocate in East Hampton (Tr. 188–190). Thus it could be argued that Shea started participating in local civic activities with this hearing in mind. Shea didn't file his application until March 21, 1983. Nevertheless Shea will be credited with his local East Hampton activities since they are the type of political activities an attorney would participate in even if he wasn't applying for an FM channel.

28. John Shea is a practicing lawyer. He was admitted to the New York State Bar in March of 1973. He practiced in New York State before moving to Washington, D. C. in the summer of 1979. He practiced in Washington, D. C. as counsel to the Council on Environmental Quality in the Executive Office of the President before moving to East Hampton. He is presently a partner in the law firm of Twomey, Latham and Shea.

29. Since moving to East Hampton, Shea has become civically active (see Footnote 11). He has been counsel for the East Hampton Village Preservation Society from June 1982 to the present; he has been counsel for the East Hampton Citizen's Planning Committee from March 1982 to the present; he has been a member of and counsel to the East Hampton Town Democratic Committee from September 1982 to the present; and he is a member of County Democratic Committee during the same time period.

30. Mr. Shea never has been in broadcasting, never has worked or even visited a broadcast station, and never has taken a broadcast management course (Tr. 209–210).

31. Since he is a white, non-Hispanic male, Shea cannot claim a qualitative integration enhancement.

Auxiliary Power

32. Chester and Shea each propose auxiliary power-generating equipment at their studio and transmitter sites. EHB does not.

Conclusions of Law

1. The three mutually-exclusive applicants for Channel 244A at East Hampton, New York are East Hampton Broadcasting Co., Inc. (EHB), Chester Associates (Chester), and John F. Shea, III (Shea). They have presented their evidence on the standard comparative issue. Since only one of the three can be granted, we must determine which one it will be.

2. We must direct our analysis toward two primary objectives: (1) selecting the applicant that will offer the greatest diffusion of control of mass communications media; and (2) selecting the applicant that will offer the best practicable service to the public. See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).

3. *Diversification of Mass Media.* Diversification is a factor of primary importance. It is the primary objective toward which the comparative process is directed. Neither Chester nor Shea hold

any cognizable media interests. So neither is entitled to a comparative preference as against the other. However, both of them merit a substantial preference over EHB.

4. Leonard Ackerman is President, Treasurer, Director, and 65% stockholder in EHB. He is also President, Director, and 80% stockholder of WMLB, Inc., licensee of Station WMLB, West Hartford, Connecticut. West Hartford is about 50 miles from East Hampton. Ackerman's interest warrants assessing EHB with a healthy demerit vis-a-vis the other two applicants. That demerit is decisional.

5. *Best Practical Service to the Public.* In deciding which applicant will offer the best practical service to the public, here we will examine four criteria: (1) the degree each will integrate ownership into the day-to-day management of the station (Quantitative integration); (2) the attributes each of the integrated owners will bring to that day-to-day management (Qualitative integration); this includes such factors as past broadcast experience, past education and business experience, local residence, and past participation in civic affairs in the proposed service area; (3) whether the degree of quantitative and qualitative integration each will bring is enhanced by minority or female ownership and (4) whether an applicant will provide an auxiliary power supply to assure continuous operation if a power failure occurs.

6. *Quantitative Integration.* Chester Associates claims and is entitled to 100% integration. It will fully integrate its sole General Partner, Marjorie Chester, into the proposed station's day-to-day operations. Mrs. Chester will work at least 40 hours a week as the station's General Manager.

7. John Shea, III claims and is entitled to 100% integration. As a sole proprietor, Shea will devote a minimum of 40 hours a week to being General Manager of the proposed station.

8. EHB claims and is entitled to 65% part-time and 35% full-time integration. It intends to integrate its President, Director, and 65% stockholder Leonard Ackerman only on a part-time 20 hours-a-week basis. Ackerman, despite his 65% stock ownership wouldn't be integrated into either of the proposed station's two top slots; i.e., General Manager or Station Manager. Instead Ackerman will serve part-time as Sales Manager.

9. EHB also intends to fully integrate its Vice-President, Secretary, Director, and 35% stockholder, Barbara Brannen into the station's day-to-day operations. However, like Leonard Ackerman, she will not serve in either of the station's two top slots. Ms. Brannen is slated to work at least 40 hours a week as the

Station's Public Affairs Director and Community Relations Director/Liaison.

10. Based on paras. 6-9 *supra*, both Chester and Shea are entitled to substantial and decisional preferences over EHB. Their credited 100% full-time quantitative integration is far superior to EHB's 35% full-time, 65% part-time credit. To the extent that the time spent moves away from full-time, the credit given drops sharply. And since substantially less than 50% of EHB's claim is full-time, it is fatal to EHB's comparative chances.

11. At this juncture an intermediate conclusion is warranted. EHB is out of the running and will be given no further comparative consideration. Its diversification demerit when combined with its subaverage quantitative integration proposal places it so far back that no useful purpose would be served in analyzing its qualitative integration attributes.[12] Thus we are left with two comparative applicants each entitled to 100% quantitative integration at the proposed top-level General Managership position.

12. *Qualitative Integration.* Both John Shea and Marjorie Chester are local residents, although Mrs. Chester has resided in East Hampton a longer period of time. This longer term of residence shows up again when analyzing the civic participation of the two principals. Not only has Mrs. Chester shown civic concern for East Hampton for many more years, her civic activities are more diversified, Shea's being principally extensions of his role as a practicing attorney.

13. The business and professional backgrounds of both are commendable. Shea is a trial attorney. He has practiced in both New York and Washington, D. C. Mrs. Chester is a professional writer. Shea has made broadcast management a part of her educational background. Shea has no past broadcast experience, and Marjorie Chester has had very little.

14. When local residence, local civic activity, business experience, past education, and past broadcast experience are considered in combination, Mrs. Chester deserves a slight preference over Shea although that preference is far from being decisional—or even substantial for that matter.

15. *Minority or Female Enhancement.* Marjorie Chester is entitled to a substantial preference on this score. Her already strong 100% integration showing is enhanced by her female

[12] Note, however, that comparative findings have been made on all facets of EHB's comparative proposal. See Findings 9-18 *supra*. It is only further comparative conclusions that aren't required. See *Cannon's Point Broadcasting Company*, 93 FCC 2d 643 (R. Bd. 1983) at 649.

participation in the station's top management slot; i.e., the General Manager. Shea, on the other hand, is a white, non-Hispanic male. He is entitled to no enhancement whatsoever.

16. *Auxiliary Power.* Both Chester and Shea propose auxiliary power. So no preference to either applicant is warranted.

Ultimate Conclusion

17. Chester Associates, behind a strong showing by its General Partner, Marjorie Chester prevails under the standard comparative issue. She has a slight edge over John Shea both in the area of local residence and civic participation. She also has a *de minimis* advantage on past broadcast experience. But her advantage becomes truly clear and significant when her female enhancement is credited. So it is concluded that Chester Associates will offer the best practicable service to the public in East Hampton, New York, and her application will be granted.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, the application of Giraud Chester and Marjorie Chester, d/b/a Chester Associates (BPH-830318AC) IS GRANTED; and

East Hampton Broadcasting Co., Inc.'s (BPH-821028AP) and John F. Shea, III's (BPH-830321AL) applications ARE DENIED.[13]

FEDERAL COMMUNICATIONS COMMISSION

WALTER C. MILLER, *Administrative Law Judge*

[13] If exceptions aren't filed within 30 days or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

CATV, Non Video Transmission Services
Common Carrier, Definition
State Law

The provision of non-video transmission service by a subsidiary of a company providing cable television is found to be not common carriage and prior state certification requirements applicable to the services are preempted because of the effect such requirements have on federal policies.
—*Cox Cable Communications, Inc.*

FCC 85-455

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Cox Cable Communications, Inc., Commline, Inc. and Cox DTS, Inc.	File No. CCB-DFD-83-1
Petition for Declaratory Ruling	

MEMORANDUM OPINION, DECLARATORY RULING, AND ORDER

Adopted: August 7, 1985; Released: September 5, 1985

BY THE COMMISSION: COMMISSIONER QUELLO DISSENTING AND ISSUING A STATEMENT; COMMISSIONER RIVERA NOT PARTICIPATING.

1. The Commission has before it a petition for declaratory ruling filed by Cox Cable Communications, Inc. (Cox), and its wholly-owned subsidiaries, Cox DTS, Inc. (Cox DTS) and Commline, Inc. The petition seeks a ruling that "this Commission has jurisdiction over and has preempted state and local regulation of facilities located wholly within one state and used to originate, distribute or terminate interstate communications including such facilities [that] also distribute intrastate communications."[1]

[1] *See* paras. 6-8 *infra* for a complete discussion of the Cox request.

Thirty-eight parties filed comments on the petition and twenty-two parties filed replies.[2]

2. Cox's request arises from a Nebraska Public Service Commission (NPSC) order requiring Cox's subsidiary, Commline of Omaha, Inc. (Commline), to cease and desist from providing certain services in Omaha, Nebraska until it obtains a certificate of public convenience and necessity from the NPSC. For the reasons stated herein, we find that the uncertainty caused by the Nebraska prior certification requirement has impaired, and likely will continue to impair, Commline's ability to provide interstate services. We also find that the Nebraska prior certification requirement conflicts with and stands as an obstacle to the accomplishment and execution of our policies encouraging the development of a competitive interstate communications marketplace, encouraging the provision of services other than video services over cable facilities, and encouraging efficient use of communications facilities. Therefore, we hereby preempt the Nebraska prior certification requirement as it relates to the provision of service by Commline.

I. Background

3. Cox is an operator of cable television systems servicing over 1.2 million subscribers in 23 states. Commline, Inc. was formed by Cox to develop and operate "institutional"[3] high-speed digital transmission services (including video teleconferencing, electronic mail, and high speed facsimile) in the markets in which Cox's cable television systems are franchised and committed to providing such services. Cox DTS was formed to be the licensee and operator of Digital Termination System (DTS) facilities.[4] Cox Cable of Omaha, Inc. (Cox-Omaha), a subsidiary of Cox, operates a cable television system in Omaha, Nebraska. Pursuant to a non-exclusive franchise granted by the city, two cables have been installed by Cox-Omaha: cable A, called the "residential" cable, is used to transmit television broadcasts and pay television programming and to provide Cox's INDAX (tm) service;[5] cable B,

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[2] *See* paras. 9-17 *infra.*

[3] As used in the pleadings, "institutional" services refer to services offered to businesses and institutions, as opposed to those services offered to residential customers.

[4] Digital Termination System (DTS) facilities are microwave radio facilities providing local distribution of communications in the Digital Electronic Message Service (DEMS).

[5] INDAX (tm) is Cox's residential subscriber service, which is offered on cable A and permits a variety of transactional services such as banking and information

called the institutional cable, is used by Commline to provide high-speed digital transmission services to governmental and educational institutions and private businesses. According to its petition, Cox plans to interconnect the institutional cable network with DTS facilities for which Cox DTS has filed a construction permit application, in order to expand the coverage and increase the flexibility of the two technologies. Commline expects to provide service to interstate satellite and microwave carriers, such as MCI Telecommunications Corp. (MCI), for whom Commline already originates and terminates interstate traffic.

4. In December of 1982 when Commline was preparing to provide its transmission services in Omaha, the NPSC instituted an investigation of Cox, Commline and MCI to determine: (1) whether Commline and Cox's INDAX service were subject to NPSC authority and, therefore, whether Cox was required to obtain a certificate of public convenience under Nebraska statutes and (2) the impact of Commline/MIC services on Northwestern Bell Telephone Co. and other telecommunications carriers. On April 19, 1983, after conducting several days of hearings, the NPSC issued an order concluding that Commline "is a carrier furnishing communication services for hire in Nebraska intrastate commerce and, as such, is a common carrier subject to regulation by this Commission . . . . "[6] Thus, the NPSC ordered Commline to "cease and desist from offering communications service for hire in Nebraska" until it had received a certificate of public convenience and necessity from the NPSC.[7]

5. Shortly thereafter Cox filed a request for a preliminary injunction against the enforcement of the NPSC cease and desist order in the United States District Court for the District of Nebraska. The court found that it was not possible at that time to know whether the NPSC would grant a certificate to Commline or, if it did grant a certificate, what type of regulation would be imposed. Thus, it decided to abstain from ruling on the constitutional questions raised by the petitioners while Cox sought a certificate from the NPSC, but retained jurisdiction over the case. The court granted a preliminary injunction pending the outcome of the NPSC proceeding.[8]

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retrieval. The request for declaratory ruling is directed only to the services offered by Commline on the B cable. Cox Reply at 4.

[6] In the Matter of the Nebraska Public Service Commission Investigation into Proposed Operations of Cox Cable, MCI, and Commline, at 2 (April 19, 1983).

[7] *Id.* at 3.

[8] In granting the preliminary injunction, the court found that Commline would be placed at a severe disadvantage if it were forced to suspend operations

A. The Cox Petition

6. In its petition, Cox generally asks that this Commission enter declaratory rulings that it has jurisdiction over and has preempted state and local regulation of all facilities located wholly within one state and used to originate or terminate interstate communications, including such facilities that also distribute intrastate communications. Cox states that the NPSC investigation has had an adverse effect upon Commline's marketing and on the development of its business and that this Commission must preempt state regulation in order to encourage the rapid development of new and innovative cable services. State common carrier regulation, like that imposed by the NPSC, presents "a clear and present danger" to the development of cable television technology and new communications service, according to Cox.[9]

7. In support of the petition, Cox states that its institutional cable will be used to originate and terminate interstate traffic and as such is subject to this Commission's jurisdiction. Although its institutional cable also will be used for intrastate communications, Cox argues that the configuration of Commline's plant is such that a single coaxial cable channel assigned to a Commline customer will carry both the local and interstate traffic on a nonsegregable, combined basis.[10] Thus, relying on *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) (NCUC I), and *People of the State of California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977), it argues that state and local regulation of the intrastate traffic should be preempted because such regulation would be infeasible and impractical and would interfere with interstate services and federal policies. Although some of its customers may not use the Commline facilities for any interstate services (*i.e.* all their communications would originate and terminate in Omaha) Cox argues that since these wholly intrastate customers will use the same cable and facilities as customers who have some interstate needs, it would be impractical to separate the interstate and intrastate use. Finally, Cox argues that this Commission already has preempted state regula-

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pending the outcome of the state proceedings. Cox Cable Communications, Inc. v. Simpson, 569 F. Supp. 507, 517 (D. Neb. 1983).

[9] Petition at 36.

[10] Petition at 15-16. It argues that the only feasible way to segregate the intrastate traffic from the interstate traffic would be to build separate and distinct cables for interstate and intrastate use.

tion of DTS facilities and that state regulation that impedes interconnection with DTS likewise has been preempted.

8. Cox also argues that since it does not hold itself out to serve the public indiscriminately but rather chooses with whom to deal and on what terms, it is not a common carrier.[11] If it is not a common carrier, sections 2(b) and 221(b) of the Communications Act, 47 U.S.C. §§ 2(b) and 221(b), which reserve to the states jurisdiction over intrastate and "exchange" common carrier services, do not apply and thus are no bar to federal preemption, according to Cox. Additionally, Cox argues that no "telephone exchange" services or facilities are involved in the Commline services or in the interconnection of Commline services with DTS facilities.[12] Finally, Cox states that it intends to offer "enhanced services" and, therefore, under this Commission's *Computer II* decision[13] state regulation of those services has been preempted.

B. Comments

9. Comments supporting the petition were received from cable companies,[14] cable equipment manufacturers,[15] MCI Telecommuni-

[11] In support of this argument Cox cites National Ass'n of Regulatory Util. Comm'r v. FCC, 525 F.2d 630 (D.C. Cir. 1976) (NARUC I) and National Ass'n of Regulatory Util. Comm'r v. FCC, 533 F.2d 601 (D.C. Cir. 1976) (NARUC II).

[12] Cox argues that its services are not switched and states that although the institutional cable can carry voice traffic with additional terminal equipment, Commline does not provide such equipment. Petition at 42-43. Cox also states that many of the services Commline offers are not or have not been generally available in Nebraska and, therefore, that Commline's operations will have little or no effect upon Northwestern Bell and its telephone exchange traffic and revenue.

[13] Second Computer Inquiry, 77 FCC 2d 384 (1980), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer & Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *second further reconsideration*, FCC 84-190 (released May 4, 1984).

[14] Cable companies submitting comments were: Warner Amex Cable Communications, Inc (Warner); Westinghouse Broadcasting and Cable, Inc. (Westinghouse); A-R Telecommunications Division of Adams-Russell, Satellite Syndicated Systems, Inc., and Joseph S. Gans Cable TV, Inc. (joint comments) A-R Telecommunications); Tribune Cable Communications Inc. and Continental Cablevision, Inc. (joint comments) (Tribune); Storer Communications, Inc. (Storer); General Electric Cablevision Corp. (General Electric); Viacom International, Inc. (Viacom); Rogers U.S. Cablesystems, Inc. (Rogers); Cablevision Systems Development Co. (Cablevision); Times Mirror Cable Television, Inc. (Times Mirror); and Scripps-Howard Broadcasting Co. (Scripps-Howard). In addition, Albuquerque Cable Television Inc., Wentronics, Inc. and Santa Fe Cablevision Co. (Albuquerque) filed late comments together with a motion for acceptance of informal comments. We hereby accept Albuquerque's comments.

[15] Manufacturers submitting comments were: General Instrument Corp. (General Instrument); C-Cor Electronics, Inc., Texscan Corp. and Scientific Atlanta.

cations Corp., Satellite Business Systems, the National Cable Telecommunications Association, Inc. (NCTA), and the cities of Santa Ana, California and Omaha, Nebraska. In addition to reiterating the legal arguments raised by Cox, many of the cable companies described difficulties that they had had with various telephone companies or state regulatory bodies in their attempts to provide services similar to those provided by Commline. These companies argue that if this Commission fails to act to preempt state regulation of their facilities and services, technological innovations in cable communications will be impeded.[16] Other commenters allege that Northwestern Bell and other telephone companies opposing similar services simply are trying to stifle competition.[17]

10. Comments opposing the petition were received from telephone companies,[18] the United States Independent Telephone Association (USITA), the states of California and New Jersey,[19] the Nebraska Department of Justice, the Michigan and New York Public Service Commissions, and the Washington Utilities and Transportation Commission. Several arguments were raised by these commenters. First, they argue that in *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) (NARUC II), the D.C. Circuit already has determined that the FCC may not preempt state regulation of two-way, point-to-point, non-video communications.[20]

11. The telephone companies and states also argue that Commline is operating as a common carrier because its objective clearly is to serve as a large a body of subscribers as it can. In response to the Cox assertion that it and other cable companies are not common carriers because they make individualized decisions

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[16] General Instrument at 11-17; Cablevision at 9-11, 38; Albuquerque, passim. Westinghouse argues that the viability of conventional cable programming may depend upon cable's ability to provide these new services. Westinghouse at 2. *See also* Reply Comments of Rogers which includes an appendix listing eight states that are considering regulation of Commline-type services.

[17] *See, e.g.,* Rogers at 3. Rogers also argued that many of the services provided by its cable subsidiary, Cablesystems Pacific, are "enhanced services" under the *Second Computer Inquiry*, not 13 *supra*, and thus preempted on that basis.

[18] Telephone companies submitting comments include: The American Telephone and Telegraph Co. (AT&T); United Telecommunications (United); Pacific Telephone and Telegraph Co. (PT&T); Ameritech (on behalf of its telephone operating companies); Northwestern Bell Telephone Co., Mountain States Telephone and Telegraph Co. and Pacific Northwest Bell Telephone Co. (Northwestern); and the telephone companies of the NYNEX, Bell Atlantic, Bell South and Southwestern Bell regions (BOCs).

[19] The State of New Jersey also filed a motion to accept late filed pleadings. That motion is hereby granted.

[20] *See, e.g.*, AT&T at 7.

relating to with whom they will deal and under what conditions, the telephone companies assert that a company cannot avoid common carrier status simply by opting out of the some of the rules that govern the behavior of carriers. They also argue that the service is common carrier communications service because, unlike traditional cable services, the data and voice services available over Cox facilities are pure transmission service under which the customer transmits intelligence of his own design and choosing.[21]

12. These commenters argue that there is a lack of factual support for Cox's claim that it is impossible to segregate the inter- and intrastate services and that no reason has been demonstrated for exempting Cox and other cable companies from jurisdictional separations when other carriers are subject to that process.[22] Many of the telephone companies argue that Cox's use of coaxial cable utilizing broadband technology is not unique and object to what they see as an attempt to provide services identical to what the telephone companies provide without the regulatory burdens imposed upon the telephone companies.[23] They argue that it would be neither legal nor fair to grant cable companies such a favored position and state that the impact on local telephone companies could be severe resulting in a significant drain on revenues.[24] Northwestern argues that if the Commission does "preempt state regulatory jurisdiction over point-to-point telecommunications cable facilities used to provide both interstate and intrastate communications within an exchange area, such preemption must be tailored so as not to favor one supplier (or one technology . . .) over another."[25]

13. Several commenters also question the advisability of ruling on questions of this importance and breadth pursuant to a

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[21] *See, e.g.*, BOCs at 7.

[22] BOCs at 5; Ameritech at 15.

[23] Northwestern states that the "institutional" cable is a coaxial cable similar to those used in the telephone industry and that Northwestern itself provides the same services that Commline provides. It also argues that Cox's request, if granted as proposed, would preempt practically all state regulation now in place over intrastate facilities and services.

[24] Ameritech at 3-4; Northwestern at 60-65. Northwestern states, for example, that the $2.5 million per year that Cox has stated it hopes to earn in the first five years of business is "the vast majority of Northwestern Bell's Omaha private line revenues of $3 million per year. Northwestern also requests that "[a]s part of [the Commission's] decision in this proceeding [we] should make it clear that [the] 'pole attachment' pricing rules do not apply to . . . cable used . . . to provide services that are similar to telecommunications services provided by telephone companies." *Id.* at 45.

[25] Northwestern at 17-18.

declaratory ruling request. PT&T notes that the Commission's authority to issue a declaratory ruling is founded upon the adjudication section of the Administrative Procedure Act and argues that an agency should proceed by rulemaking if it seeks to establish rules of widespread application.[26] NTIA, agreeing with these comments, suggests that more information is needed on the threat of bypass before this Commission can properly rule on the petitions.[27] On the other hand MCI argues that if the Commission declines to act at this time, the services proposed by the cable companies will never develop. MCI suggests that if there is to be an inquiry if should follow a developmental period, after which the Commission would have meaningful information on whether regulation is desirable or necessary.

14. Reply comments were filed by twenty-two entities.[28] In large part, the replies reiterate the initial comments filed. Several additional arguments were raised, however, and Cox clarified its original request stating that its petition for declaratory ruling was directed only to Commline's facilities and services and not to INDAX, Cox's residential subscriber service offered on Cable A. Cox also stated that its "petition does not seek a declaratory ruling of federal preemption over '*all* state regulation' of 'switched' facilities . . . or the local 'loop' plant of telephone companies' intrastate monopoly services and 'local exchange service.' " It states that Cox has no intention of providing

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[26] PT&T at 3-5; *See also* Northwestern at 5-6; NYNEX Reply Comments at 2; AT&T Reply Comments at 4-5.

[27] NTIA at 5. Bypass generally refers to the phenomenon of telecommunications users abandoning the local exchange network by using alternative facilities, primarily user-owned and operated facilities. *See* Third Report and Order in MTS and WATS Market Structure, 93 FCC 2d 241, Appendix F (1983), *aff'd in part and remanded in part*, National Ass'n of Regulatory Utility Comm'rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *petition for cert. filed*, No. 84-95 (filed July 18, 1984).

[28] Replies were filed by Ameritech, AT&T, the BOCs, Cox, General Electric Cablevision, Hughes, MCI, the Michigan Public Service Commission (Michigan), California, NARUC, NCTA, NTIA, Northwestern Bell, Rogers, Scripps-Howard, PT&T, California, Time, Inc., USITA, Warner Amex, and Westinghouse. In addition, the State of California filed an *ex parte* communication relating to its opposition to the enactment of H.R. 4103. Finally, on July 22, 1985, the United States Telephone Ass'n (formerly USITA) filed supplemental comments together with a motion to accept the comments. The supplemental comments argued that the lapse of time since the record in this case was closed render a decision at this time inappropriate. NCTA, United Cable Television Corp. and Cox opposed the motion and the National Telephone Cooperative Association, OPASTCO and North Pittsburgh Telphone Co. supported the motion. USTA replied. USTA's motion to accept the comments is hereby granted. Nonetheless, as indicated herein, we believe we have sufficient information to rule on a part of the Cox request.

exchange or basic telephone service and does not seek federal preemption over such services if provided by cable systems. Its petition is limited to its current or planned services which it describes as dedicated private lines "intended to be, and which demonstrably are, unlike local telephone exchange service."

15. Cox, and the commenters supporting its petition, challenge the assertion made by several commenters that *NARUC II* precludes this Commission from granting the requested relief. Although the Court in *NARUC II* held that this Commission could not preempt state common carrier regulation of a cable system's leased access channels used for two-way point-to-point communication, Cox argues that the *NARUC II* case is distinguishable from the case now before the Commission. According to Cox the only proposition for which the case may be cited is that the FCC may not preempt state regulations of such services based on its "reasonably ancillary to broadcasting" powers.

16. The cable companies also argue that it would make no sense to treat them as common carriers simply because they seek to maximize their customer base since all prudent businessmen seek to do so. Rather, they assert that the common carrier inquiry should focus on how a company deals with its customers, *i.e.*, whether a company undertakes to serve all customers indifferently.[29] Since Commline and other cable companies tailor their offerings to the individual customer, they should not be treated as common carriers, according to these commenters.

17. Reply comments filed by the telephone companies and others opposing Cox's petition argue, primarily, that Cox is in fact operating as a common carrier and that Cox's attempts to distinguish the services it provides from those provided by telephone companies should not be accepted by this Commission. Northwestern, for example, argues that simply labeling the services as "broadband" as Cox has done is irrelevant; whether a cable is broadband has nothing to do with service classification.[30] Regardless of the nature of the service, the telephone companies argue for parity in regulatory treatment. If the Commission allows Cox to provide its two-way services on an unregulated basis these companies argue that all businesses, including telephone companies, should be treated similarly.[31]

18. Finally, several commenters disagreed with NTIA's suggestion that the Commission conduct a rulemaking proceeding on the

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[29] NCTA Reply Comments at 20.
[30] Northwestern Rely at 11.
[31] Ameritech Reply at 4-12.

issues raised in the Cox petition. They argue that the primary questions to be resolved are legal rather than factual and that the legal issues have been fully briefed in the comments.

II. Discussion

A. Procedural Matters

19. The first issue to be resolved is whether it is appropriate for this Commission to issue a delcaratory ruling on the subjects raised by the Cox petition. As noted above, several parties urge us to refrain from issuing any ruling in this proceeding and, instead, commence a rulemaking. These commenters generally argue that there is insufficient information to issue a ruling at this time. In addition, USTA argues that we should not rule on the petition since the record is stale.

20. It is clearly within the power of this agency to proceed either by declaratory ruling or by rulemaking. *See NCUC I* at 790, n.2. The Commission has issued declaratory rulings on preemption issues on several occasions. *See, e.g., Ortho-Vision*, 69 FCC2d 657 (1978), *reconsideration*, 82 FCC2d 178 (1980), *aff'd sub nom. New York State Comm'n on Cable Television, v. FCC*, 699 F.2d 58 (2d Cir. 1982); *Earth Satellite Communications, Inc.*, FCC 83-526 (released Nov. 17, 1983), *aff'd sub nom. New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984); *Telerent Leasing Corp.*, 45 FCC2d 204 (1974), *aff'd sub nom. North Carolina Utilities Comm'n v. FCC, supra.*[32] We believe that with respect to at least some of the issues raised, the Commission has sufficient information to rule. We have received extensive comments and reply comments on what primarily are legal and policy (rather than factual) issues, and it is not clear that further proceedings would generate additional relevant information contributing to a better decision.

B. Common Carrier Status[33]

21. As is noted above, Cox has asked this Commission to issue

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[32] It also has declined to issue a requested ruling when it found it had insufficient information before it. *See Aeronautical Radio, Inc.*, 77 FCC 2d 535 (1980).

[33] Several commenters argue that the holding in *NARUC II*, note 11 *supra*, precludes a finding by this Commission that Commline's services and facilities are not common carriage. However, only one judge (Judge Wilkey) made a finding that the provision of two-way, point-to-point, non-video communications in that case was common carriage. The other two judges specifically questioned Judge Wilkey's conclusion. In addition, Judge Wilkey's finding rested on the requirement, then contained in the Commission's rules, that cable operators provide "first-come, non-discriminatory access" to their leased channels. These

an order stating that it currently operates, Commline is not a "common carrier" within the meaning of Section 3(h) of the Communications Act, 47 U.S.C. § 153(h). Whether Commline is operating as a common carrier within the meaning of Section 3(h) does not affect this Commission's jurisdiction over Commline's interstate facilities and services. But because Section 2(b), 47 U.S.C. §152(b), limits this Commission's jurisdiction over intrastate communications of any common carrier, it may affect the preemption analysis. Thus, we shall first decide whether Commline is acting as a common carrier in its provision of service in Omaha for purposes of the Communications Act.

22. The test most often cited for whether an entity providing communications service is a common carrier was enunciated in *NARUC I*, note 11 *supra*. In that case the court found that to be a common carrier an entity must either be under a legal compulsion to "hold himself out indiscriminately to the clientele one is suited to serve" or, if not under legal compulsion, in fact to do so. *Id.* at 641.

23. The Nebraska PCS found that Commline is a common carrier and that "the record clearly shows that Commline would offer to serve any customer along its cable who had need of its service." We do not believe that finding satisfies the test articulated in *NARUC I*, since it does not include an "indiscriminate holding out" or an indiscriminate offering of the services. In any event, we are not bound by the Nebraska finding for the purposes of determining common carrier status under the Communications Act.[34] We must make our own analysis of Commline's status.

24. Commline claims that it deals on an individual basis with each potential customer, that it does not have set prices or terms and conditions and that, therefore, it is not a common carrier.[35]

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rules were subsequently overturned in Midwest Video Corp. v. FCC, 440 U.S. 689 (1979). Therefore, *NARUC II* does not dictate any particular decision as to whether Commline is operating as a common carrier in Omaha.

[34] We note that the Nebraska statute defines "common carriers" as specifically including "contract carrier". *See* Neb. Rev. Stat. § 75-109.

[35] In its reply comments, Westinghouse described the specialized nature of these types of services as follows: "cable systems can be configured for a given customer so as to provide the precise bandwidth necessary to meet the particular mix of video, data, and/or audio transmission needs unique to a given user ... By selecting among different frequency arrangements and addressability techniques and by incorporating a variety of terminal devices and modems at customer sites, cable services are tailored to meet unique requirements. Cable services necessarily are founded on the given set of requirements that are unique to a given user, rather than a uniform channel or circuit assignment." Westinghouse Reply at 6-7.

No party brought forth evidence that Commline actually operates in a manner different than it claims. The evidence of the commenters on the other side amounts to little more than claims that Commline would like to sell its service to more customers and that if two customers did obtain the exact same service features, they would be charged the same price. An indiscriminate offering requires more than a desire to serve more customers, and the consequent actions taken in order to obtain more customers (*e.g.*, a willingness to discuss the services offered with any interested party). An indiscriminate offering includes an offering to provide service without negotiation of provision of the service on an individualized basis. It appears that Commline does conduct business through individualized negotiations and does not hold itself out to serve the public indiscriminately.

25. When comparing Commline's services to the Specialized Mobile Radio Service (SMRS) found to be non-common carrier in *NARUC I*, it appears that Commline's services have most of the attributes of non-common carriage that SMRS has. In *NARUC I*, the court found SMRS not to be common carriage because the service "would involve the establishment of medium to long term relationships" with a fairly stable customer base and because the SMRS operators would make "individualized decisions about the desirability and compatibility of serving new customers." It appears that the Commline services also will tend to involve long term relationships and, since the service is somewhat specialized, *see* note 36 *supra*, it lends itself to individualized determinations as to the ability and desirability of serving new customers.

26. The second part of the *NARUC I* test is whether there is any legal compulsion for Commline to hold itself out indiscriminately to the public. *See generally Transponder Sales*, 90 FCC 2d 1238, 1255–57 (1982), *aff'd sub nom. World Communications, Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984). Certainly, this Commission has never found Commline to be compelled to hold itself out indiscriminately. The other aspect of this question is whether there is any reason to require Commline to hold itself out indiscriminately, *i.e.*, is there any compelling reason to regulate Commline as a common carrier. We find that there is none.

27. Commline has little or no market power. Although there are some barriers to entry into the market, they do not appear to be sufficiently high to vest Commline with market power. There are alternative methods of providing similar service.[36] DEMS is one

[36] *See also* In re Lightnet, File No. W-P-C-5166, FCC 85-276 (released May 20, 1985).

alternative; over a dozen carriers have applied for DEMS in Omaha and several construction permits have been granted. In addition, although Cox was able to lay its cable pursuant to a franchise granted by Omaha, that franchise is not exclusive.

28. In addition, the Commline service is similar to private line service and we assume that it will be used primarily by companies and institutions with some ability to protect their rights in dealing with Commline. Further, the Commline service does not have the characteristics of, and could compete to only a limited extend with, traditional telephone exchange service and switched access service.[37] Accordingly, we find there is no compelling reason to regulate Commline as a common carrier.[38]

C. Preemption

29. The second major ruling requested by Cox is that state regulation of facilities like Commline's that are used to originate and terminate interstate communications are preempted because of the effect such regulation would have on interstate communications and federal law and policy. There is no dispute that the service being provided by Commline is a communication service by wire and that at least one of its customer is using the facilities for the origination and/or termination of interstate communications.[39] Section 2(a) of the Communications Act, 47 U.S.C. § 152(a), provides that the Act's provisions apply to "all interstate and foreign communication by wire or radio." It is also clear that the Commission has end-to-end jurisdiction over facilities

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[37] Although the "cable headend" performs a primitive switching function, the switch is unlike a switch in the telephone hierarchy in that a cable subscriber cannot "call" every other subscriber connected to the switch; subscribers can only communicate with predesignated locations. In that way, the communications service is more like a point-to-point or point-to-multipoint private line service than a switched service or "telephone exchange service," which is defined in Section 3 of the Communications Act, 47 U.S.C. § 153, as "interconnecting service of the character ordinarily furnished by a single exchange . . . ."

[38] We note that the State of California recently completed an investigation into the question of whether intraLATA toll competition should be allowed. While generally refusing to authorize intraLATA competition, it made an exception for high-speed data transmission services over private line networks. It based its decision in part upon findings that private line revenues are less than 2% of Pacific Telephone's total local service revenues, private line competition does not threaten the universal network, and competition may solve the problem of customer dissatisfaction with private line service being provided at that time. *See* California Public Utilities Comm'n Order, 84-06-113 (June 13, 1984).

[39] As noted above, MCI has been a customer of Commline for some time. Telephone Bypass News (April 1985) reports that Commline now is providing local distribution facilities for GTE/Sprint as well as MCI.

used in interstate communication and the interstate services provided over those facilities regardless of the facilities' physical location. *See, e.g., People of the State of California v. FCC, supra. See also AT&T*, 71 FCC 2d 1 (1979); *AT&T* (Arco), Mimeo No. 636 (Nov. 8, 1983), *reconsideration*, Mimeo No. 3267 (April 3, 1984). In addition, it is clear the Commission has jurisdiction over the facilities used in interstate communications even if they are "primarily" used for intrastate service. *See, e.g., North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036, 1045–47 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) (NCUC II); *Puerto Rico Telephone Co v. FCC*, 553 F.2d 694, 700 (1st Cir. 1977).[40]

30. As a general matter federal law preempts state law when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Other courts have stated the test in slightly different language, but the concept remains one of federal supremacy over conflicting state laws or regulations. *See, e.g., Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (federal law will preempt state law when compliance with both federal and state law regulations is impossible); *Fidelity Federal Savings & Loan Co. v. de la Cuesta*, 458 U.S. 141 (1982) (nullifies state law to the extent that it actually conflicts with federal law). Moreover, in the communications field, the courts have acknowledged that our authority encompasses the power to preempt state regulation that substantially affects federal regulation of interstate communications or federal policy related thereto or when the dual use of the facilities renders separation for regulatory purposes impractical.[41]

31. Turning to the Cox petition, it is important, at the outset, to discuss several general arguments of the commenters opposing the Cox petition. First, they argue that the holding in *NARUC II*

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[40] Some have argued that the Commission does not have jurisdiction over the Commline facilities and services if they are found to be non-common carrier. However, the Court in United States v. Southwestern Cable Co., 392 U.S. 159 (1968), stated: "Nothing in the language of § 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions." *Id.* at 172; *but see* NARUC v. FCC, 533 F.2d 601, at 612, 622 (Opinion of Judge Wilkey and concurring opinion of Judge Lombard, suggesting that Section 2(a) powers are contingent upon specifically delegated powers). We need not decide here whether Section 2(a) constitutes an independent source of jurisdiction over these facilities and services because the preemptive authority exercised herein is clearly ancillary to our Title III and Title II powers.

[41] *See* Computer & Communications Industry Ass'n v. FCC, 693 F.2d 198, 215 (D. C. Cir. 1982); NCUC I, *supra.*

prevents this Commission from preempting state and local regulation over the use of cable system leased access channels used for two-way point-to-point, non-video communications. The holding in the *NARUC II* case was more narrow, however. Not only were the factual predicates of the decision different,[42] but also there was disagreement between the judges as to the reason for overturning the Commission. We agree with the commenters who assert that the only proposition for which *NARUC II* should be cited as precedent is that our decision to preempt in that case exceeded our jurisdiction under the "ancillary to broadcasting" standard recognized in *United States v. Southwestern Cable Co.*, 392 U.S. 159 (1968). Our authority to preempt in this instance is not based upon our jurisdiction to regulate matters ancillary to broadcasting. Our actions are based upon our expansive ancillary federal authority over interstate wire communications, *see* 47 U.S.C. § 152(a), and the effect that state regulation would have on various federal policies.

32. Second, the telephone companies argue that Sections 2(b) and 221(b) of the Communications Act prevent the Commission from preempting state regulation in this case. Section 2(b) states only that nothing in the Act gives the Commission jurisdiction over "intrastate communications service . . . of any [common] carrier." Since we have found that Commline is not acting as a common carrier in this case, Section 2(b) is inapplicable. *See* NARUC I, note 11 *supra*;[43] Likewise, Section 221(b) does not

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[42] *See, e.g.*, the opinion of Judge Wilkey, which distinguished the facts of *NARUC* from those of *Southwestern Cable* on the basis that *Southwestern Cable* dealt with activity that, as in the case here, was "unquestionably interstate". *NARUC II* at 613, n. 69.

[43] Even if Commline were acting as a common carrier, we would not be precluded from preempting state regulation of the services. In NCUC I, note 11 *supra*, the Court stated:

> We have no doubt that the provisions of Section 2(b) deprive the Commission of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications. But beyond that, we are not persuaded that Section 2(b) sanctions any state regulation formally restrictive only of intrastate communication that in effect encroaches substantially upon the Commission's authority under Section 201 through 205.

The reference to Sections 201-205 reflects only that, in that case, state regulation relating to CPE interconnection would have violated this Commission's findings relevant to the reasonableness of certain tariff provisions. Of course, this Commission's power to preempt state action that substantially encroaches upon our authority over non-common carrier interstate communications is not triggered solely by state policies that impede our authority under Sections 201-205, but may arise whenever any of our federal policies is impeded.

affect the Commission's authority to preempt in this case. As the Commission stated in *AT&T*, FCC 85-368 (released July 25, 1985), Section 221(b) "adds nothing to what is reserved to the states by the general exemption from Commission regulation . . . in Section 2(b)(1) except as to local exchange service in cross-border exchange areas."[44]

33. Finally, several commenters argue that this Commission cannot preempt state regulation of intrastate activities when the Commission itself does not regulate the facilities or services. There are many cases, however, in which federal preemption has been upheld when the federal policy is one of minimal regulation or forebearance. *See, e.g., Brookhaven Cable TV v. Kelly*, 573 F.2d 765 (2d Cir. 1978) (preemption of state price regulation of pay-cable upheld even though the FCC did not regulate pay cable prices); *Orthovision, supra* (preemption of regulation of MATV systems upheld even though FCC does not regulate them); *Second Computer Inquiry*, note 13 *supra* (preemption of state regulation of CPE upheld even though the FCC had declined to regulate it).

34. With respect to the Commline services, we conclude that this Commission should preempt the Nebraska action requiring Commline to apply for a certificate of public convenience because the state action impermissibly infringes on federal policies. Because some of the Commline customers use the facilities for intrastate communications,[45] the Nebraska order, which only addresses intrastate service, did not exceed Nebraska state jurisdiction.[46] We find, however, that the Nebraska action has had

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[44] Nor does Section 621(d)(2) of the Cable Communications Act of 1984 affect this Commission's authority to preempt in this case. That section provides that "Nothing in this title shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis." The legislative history makes clear that this section neither broadens nor narrows FCC or state jurisdiction over non-cable services. It states:

> It should be reiterated that it is the intent of Section 621(d) that with respect to non-cable communications services, both the power of any state public utility commission and the power of the FCC be unaffected by the provisions of Title VI. Thus, Title VI is neutral with respect to such authority.

130 Cong. Rec. S14285 (daily ed. Oct. 11, 1984).

[45] It is unclear, however, how much of the communications on the Commline facilities is inter- or intrastate. Even the customers who Commline believes are using the facilities for intrastate service may be using the facilities for interstate communications through connection of the Commline facilities to a PBX or similar equipment on the customer's premises.

[46] The Nebraska statute gives the NPSC jurisdiction over both common carriers and contract carriers. *See* Neb. Rev. Stat. § 75-109.

and is likely to continue to have a substantial adverse effect upon interstate communications. Cox has presented evidence, and the evidence has not been convincingly rebutted, that the NPSC investigation of Cox has had an adverse effect upon Commline's marketing and on the development of its services and business, including interstate access services, and that some customers have delayed taking service because of the NPSC actions.[47] In addition, the Nebraska statute relating to certificates of public convenience and necessity places a substantial burden on entities such as Commline.[48] In the event the application were denied, inefficient use of facilities would result which could lead to a severe increase in interstate costs because interstate charges would have to support the cost of the entire facility.[49] In addition, Cox testified before the Nebraska District Court that if the Nebraska order were not enjoined, Cox would shut down Commline's operations permanently.[50] Thus, we find that the Nebraska certification requirement has impaired, and likely will continue to impair, Commline's ability to provide interstate services.

35. We find that Nebraska's certification requirement conflicts with and obstructs several of our national communications

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[47] The district court found that "the uncertainty engendered by the NPSC investigation and order had deterred at least some potential customers from accepting Commline Services." 569 F. Supp. at 517. Comments by other cable companies reveal similar experiences.

[48] The Nebraska statute provides that: "Before granting a certificate of convenience and necessity, the Commission must find that: (1) the territory in which the applicant proposes to offer telephone service is not receiving reasonably adequate telephone service, (2) the portion of the territory of another telephone company in which or into which the applicant proposes to construct new lines . . . is not and will not within a reasonable time receive reasonably adequate telephone service . . . or (3) that the application is agreeable . . . to both telephone companies, . . . will not create a duplication of facilities, [and] is in the public interest." Neb. Rev. Stat. § 75-604. Regardless of whether the NPSC eventually grants the Commline application, the evidence shows that the state already interfered with Commline's provision of service.

[49] In an analogous situation in AT&T, 56 F.C.C.2d 14 (1975), *aff'd sub nom.* People of the State of California v. FCC, *supra*, this Commission stated:

> Requiring the customer to maintain two redundant facilities or to invest in expensive additional equipment simply because of jurisdictional conflicts would violate our congressional mandate in Section 1 of the Communications Act to regulate "interstate and foreign commerce in communication by wire or radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide and world-wide wire and radio communications service with adequate facilities at reasonable charges."

Id. at 19. *See also* AT&T (TWX), 38 FCC 1127 (1965).

[50] In its reply comments Rogers states that the May 9, 1983, issue of *Cablevision* Magazine reported that the Nebraska Public Service Commission had "indicated that issuance of . . . a certificate [to Commline] would be highly unlikely." Rogers, Reply at 7.

policies. Both GTE/Sprint and MCI utilize Cox's cable facility to terminate their interstate telecommunications networks in Omaha. The state entry regulation inherently affects, and may even foreclose, use of these facilities by long distance service providers, and thereby frustrates the federal regulatory policies designed to facilitate competitive long distance services that we have promoted in our *Competitive Carrier Rulemaking*.[51] For almost two decades this Commission has been encouraging competition in the provision of interstate common carrier services.[52] These efforts have been designed to stimulate innovation, lower rates, increase diversity and encourage the efficient use of facilities.[53] Moreover, we have encouraged the interstate carriers to use alternative facilities and technologies in their systems.[54] Indeed, Section 7(a) of the Act, 47 U.S.C. § 157(a), requires us to encourage new developments and new technologies in communications. It provides that:

> It shall be the policy of the United States to encourage the provision of new technologies to the public. Any person . . . who opposes a new technology or service . . . shall have the burden to demonstrate that such proposal is inconsistent with the public interest.

Commline and Cox are attempting to develop a means of providing interstate communications by originating and terminating interstate common carrier traffic for entities such as MCI.[55] The Nebraska state entry regulation presents a clear possibility of barring these services and precluding the new alternatives that this Commission has sought to foster. There appears to be no

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[51] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization Therefor: First Report and Order, 85 FCC 2d 1 (1980), Second Report and Order, 91 FCC 2d 59 (1982), *recon. denied*, 93 FCC 2d 54 (1983), Fourth Report and Order, 95 FCC 2d 554 (1983), Fifth Report and Order, 98 FCC 2d 1191 (1984), Sixth Report and Order, 57 Rad. Reg. 2d (P&F) 1391 (1985), *vacated*, MCI Telecommunications Corp. v. FCC, No. 85-1030 (D.C. Cir. July 9, 1985). The Court in *MCI v. FCC* only addressed the issue whether the Commission has authority under Title II to require carriers to cancel tariffs.

[52] *See, e.g.*, Specialized Common Carriers, 29 FCC 2d 870 (1971), *aff'd sub nom.* Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975); Resale and Shared Use of Common Carrier Domestic Public Switched Services, 83 FCC 2d 167 (1981).

[53] *See, e.g.*, NARUC v. FCC, No. 83-1354 (D.C. Cir. Oct. 26, 1984).

[54] *See* Notice of Proposed Rulemaking and Inquiry in Digital Telecommunications Services (Gen. Docket No. 79-188), FCC 79-464 (August 29, 1979).

[55] Some have argued that preemption in this case might result in bypass of telephone company facilities and services. This Commission has not, however, sought to prevent all bypass. We have focused upon cost-based access charges as a means of ensuring only that bypass not justified by service or cost considerations be limited.

practical or economical means of preventing Commline's customers from using these facilities for both intrastate and interstate communications, *see* note 45 *supra*. Even if there is a feasible way of preventing Commline customers from using the facilities for intrastate communications, this would result in inefficient use of facilities and, because there are few users, increase the cost of the facilities to Cox's interstate customers. Such an increase in costs could — and Cox stated in its testimony before the District Court would — destroy the viability of the service. Thus, to ensure that interstate services may be provided consistent with our federal policies, the state certification requirement must be preempted.

36. Moreover, Cox intends to utilize its intrastate institutional cable systems in conjunction with DTS facilities to provide its customers with interstate telecommunictions facilities. We have previously authorized and encouraged the use of DTS for interstate communications.[56] In the *Fifth Report and Order* in the Competitive Carrier Rulemaking, 98 FCC 2d 1191, 1205-09 (1984), we determined that a policy of regulatory forbearance would help promote the entry and expansion of DEMS and DTS systems by relieving carriers of the costs and delay of required tariff filings, would help promote competition, and would benefit consumers. *Id.* at 1207. Indeed, we have already indicated our intention to preempt inconsistent state regulation of DTS facilities because such regulation would impede the development of interstate systems.[57] State entry regulation of institutional cable systems used with DTS facilities could impede efficient development of these various interstate communications systems.[58]

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[56]In 1981, the Commission allocated radio spectrum for nationwide common carrier digital transmission networks (DEMS systems) providing high-speed, two-way transmissions. The intercity links of these networks employ satellite, microwave, fiber optics, or cable facilities, and the intracity facilities include digital termination systems (DTS) and internodal links.

[57]Digital Termination Systems, 86 FCC 2d 360, 389-90 (1981), *aff'd sub nom.* National Association of Regulatory Utility Comm'n v. FCC, 727 F.2d 1212 (D.C. Cir. 1984).

[58]The analogy between the provision of institutional interstate cable services and DTS can also be extended to the provision of Master Antenna Television (MATV) facilities. In utilizing its facilities to complete MCI's communications, Cox receives common carrier communications and then directs them over private facilities for completion. The reverse would also occur. This is analogous to what occurs when non-common carrier MATV facilities receive programming from multipoint distribution service carriers and then carry the programming to the MATV operator's customers. The Commission has previously preempted state regulation of MATV facilities because such regulation interfered with the interstate common carrier MDS services. *See* Orthovision, 69 FCC 2d 657 (1978), *reconsideration*, 82 FCC 2d 178 (1980), *aff'd sub nom.* New York State Comm'n on Cable Television v. FCC, 699 F.2d 58 (2d Cir. 1982); *see also* Earth

37. Additionally, since the inception of cable television this Commission has recognized and encouraged the use of cable facilities for services other than traditional cable services. For example, as early as 1972 in our *Cable Television Report and Order*, 36 FCC 2d 143 (1972), we recognized that cable systems were capable of providing "facsimile reproduction of newspapers, magazines, documents, etc.; electronic mail delivery; merchandising; business concern links to branch offices, primary customers or suppliers; access to computers," and many other services. *Id.* at 144 n. 10. Throughout the Commission's history of regulation of cable, it has consistently articulated a desire not to interfere with these new services and, in fact, to promote them. *See, e.g., Notice of Inquiry in Docket 18397*, 15 FCC 2d 417 (1968); *Cable Television Report and Order*, 36 FCC 2d 143, 190 (1972); *Clarification of Cable Television Rules*, 46 FCC 2d 175, 199-200 (1974); *Duplicative and Excessive Over-Regulation-CATV*, 54 FCC 2d 855 (1975).

38. Preemption of entry barriers will further another important federal policy. Spectrum for private microwave systems is now highly congested in some areas. *See First Report and Order* in Private Radio Docket No. 83-426, FCC 85-53 (released April 1, 1985).[59] Private cable systems may provide an important alternative to these congested microwave frequencies. Through encouraging the development of private cable systems we can better ensure "a rapid, efficient, nationwide . . . wire and radio communication service. . . . " 47 U.S.C. § 151.

39. In sum, we find that if the Commission does not preempt the Nebraska certification requirement, it is likely that the Commline interstate services will be severely impeded, if they are able to develop at all. This would be inconsistent with the federal policies designed to foster the development of new services, a competitive interstate communications marketplace, and the construction of efficient interstate telecommunications systems.[60]

Satellite Communications, Inc., FCC 83-526 (released November 17, 1983), *aff'd sub nom.* New York State Commission on Cable Television v. FCC, 749 F.2d 804 (D.C. Cir. 1984). Because Co is terminating common carrier interstate traffic for MCI, this case has many of the factual predicates as *Orthovision.*

[59]*See also First Report and Order*, Docket 82-334, 54 Rad. Reg. 2d 1001, 1003 (1983); *Public Notice*, Mimeo No. 35464 (released January 15, 1985) (lottery for 2.5 GHz channels); *Lottery Notice*, Mimeo No. 2429 (released February 7, 1985) (lottery for multiple address channels).

[60]We are mindful of the argument raised by the telephone companies that it is not fair to allow cable companies to provide services similar to services provided by the telephone companies if the cable companies are not subject to the same regulatory constraints as the telephone companies. With respect to

40. From the comments received in this proceeding, it appears that other cable companies in other states also are having problems similar to Commline's caused by state certification and other regulatory requirements. It also appears that state certification or other regulatory requirements that have the effect of barring entry into the intrastate provision of institutional services offered by cable television companies generally may have an impact upon and may impede the provision of interestate services by these companies. Any state regulation of institutional services offered by cable companies that acts as a *de facto* or *de jure* barrier to entry into the interstate communications market or to the provision of interstate communications must be preempted.[61] At the same time, we recognize there may be instances in which cable companies wish to provide only intrastate service or in which a cable company's ability to provide intrastate service would have little impact upon its ability to provide interstate service. In those cases the federal interest in a state certification requirement would be less. In this order, we do not address those situations in which state regulation would have no effect upon the provision of interstate service. State regulation that does not act as a barrier to the provision of interstate communications may stand.[62]

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our actions here, however, that argument holds little weight because the telephone company already is certificated, to the extent necessary, to provide services over its facilities that are most analogous to the cable facilities.

[61] A statutory requirement that only one company may provide "telephone services" in any given geographical area, coupled with a finding that the provision of institutional cable is the provision of "telephone services" is an example of a *de jure* barrier to entry. Any state regulation which treated certification as more than a ministerial act would be considered a *de facto* entry barrier, *i.e.*, a public need showing which would require a cable company to conduct interviews with businesses or provide demographic studies; or burdensome service provision regulation, such as, financial or character qualifications, if different from telephone company retirements. We recognize, however, that there may be matters relevant to the legitimate interests of states that may develop during the entry stage. To the extent that state regulation of such matters does not in any way have the effect of prohibiting or impeding entry into interstate markets, we do not propose preemption. For example, matters such as notice, zoning, health and safety may be regulated to long as the effect of such regulation is not to prohibit or impede entry. In addition, it may be necessary that states be notified of the fact that an entity is about to begin operation in order that the state can then exercise its legitimate post entry authority.

[62] Based on the comments in this proceeding we are unable to determine the effect state rate of other economic regulation would have upon interstate communications or federal law or policies. Cox argues that it is not possible to segregate interstate and intrastate use of its facilities for ratemaking purposes. The comments of the telephone companies dispute this and state that the telephone companies currently conduct usage studies for separations purposes

41. We are hopeful that this general policy statement will serve as a guide to the states in their consideration of regulatory programs to be applied to transmission services similar to Commline's. However, we recognize that parties may need to bring specific situations to our attention. We are prepared to rule on specific situations on a case-by-case basis.

III. Conclusion

42. Nebraska's ordering of Commline to cease and desist from providing intrastate services until it first obtains a state certificate of public convenience makes it unlikely that Commline can successfully provide interstate service or provide the kinds of non-video services we have found cable systems should provide. Therefore, we shall preempt the prior state certification requirements imposed by the NPSC. As noted above, *supra* para. 40, we have made the finding that any state regulation of institutional services offered by cable companies that acts as a *de facto* or *de jure* barrier to entry into the interstate communications market must be preempted.[63]

43. Accordingly, IT IS ORDERED, that the petition for declaratory ruling filed by Cox Cable Communications, Inc. and Cox DTS, Inc. IS GRANTED to the extent indicated herein and is OTHERWISE DENIED.

44. IT IS FURTHER ORDERED that the Secretary shall cause a copy of this decision to be printed in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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on those facilities most closely resembling Commline's facilities. Thus, there is clearly a factual dispute as to the feasibility of separating traffic for ratemaking purposes and we do not rule on whether, in particular circumstances, this Commission would preempt state rate or other economic regulation of Commline-type services. However, economic regulation could become a barrier to entry, and thereby be eligible for preemption if, for example, cable companies were subjected to it and telephone companies were exempted for provision of the same type of service.

[63] We decline to rule upon Northwestern's request that we clarify the applicability of the pole attachment rules to the Commline services. *See* note 24 *supra*. We have received no comments on this issue from other parties and therefore do not believe that it is appropriate to rule on that question at this time.

August 7, 1985

DISSENTING STATEMENT OF COMMISSIONER JAMES H. QUELLO

In re: Petition for Declaratory Ruling filed by Cox Cable Communications, Inc., File No. CCB-DFD-83-1, seeking Commission preemption of state and local regulation of facilities located wholly within one state and used to originate or terminate interstate communications

I am not prepared to argue, at this point, that the majority has overstepped its authority in preempting entry regulation although that well might be the case. My concern rests with the policy established in this proceeding which seems to say to the states that we will preempt only a little now but stand ready to go further if the states exercise their perogatives to regulate these new carriers.

It isn't clear to me what significant national policy is to be furthered by forcing the states to accept bypass technology while this Commission remains unable to implement significant strategies to make bypass unattractive. Until we can remove the subsidy that flows to local ratepayers, benefits will continue to accrue to those who can avoid paying the subsidy. By its action, the majority has introduced a technology with significant potential to do what the Commission's attenuated subscriber line charge was designed to prevent.

Not to worry, say the proponents of preemption, the cable industry merely wants to provide "broadband" data services, an insignificant contributor to exchange revenues. If this Commission doesn't understand by now that the money is in message telephone service, its institutional memory has been ravaged by some dread malady. And, like Willie Sutton, the new entrants in the local exchange market will simply and unerringly go where the money is.

The states have the incentives to take whatever steps are necessary to prevent serious damage to the local exchange, and I believe that they should retain the means. Therefore, I dissent.

Employment, Equal Employment Opportunity Rule, Compliance with

When a station is located in an MSA and is reasonably accessible to centers of minority population, the Commission will use MSA labor force data in the initial evaluation of the station's EEO compliance and in its determination of the reasonableness of the station's recruitment policies and efforts.
—*Delaware B/cing Co.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Delaware Broadcasting Company	
For Renewal of License of Station WILM Wilmington, Delaware	File No. BR-840323UV
Rollins Broadcasting of Delaware, Inc.	
For Renewal of License of Station WAMS Wilmington, Delaware	File No. BR-84032OUB
Central Bucks Broadcasting Company	
For Renewal of License of Station WBUX Doylestown, Pennsylvania	File No. BR-840322UY
WNPV, Inc.	
For Renewal of License of Station WNPV Lansdale, Pennsylvania	File No. BR-8490402VP

MEMORANDUM OPINION AND ORDER

Adopted: September 4, 1985; Released: September 11, 1985

BY THE COMMISSION: COMMISSIONER RIVERA NOT PARTICIPATING.

1. The Commission has before it for consideration: (i) the above-captioned license renewal applications; (ii) a petition to deny the applications filed July 2, 1984 by the National Black Media Coalition and the Tri-State Black Media (Coalition);[1] (iii) oppositions by the licensees;[2] and (iv) a reply by the Coalition. The Coalition alleges that the challenged stations' EEO records are so poor that they cannot be expected to comply with the Commission's EEO rules during the upcoming (1984–1991) license term. Accordingly, the Coalition requests that the Commission investigate the stations' employment practices and either set them for hearing or, in the case of WILM, grant renewal for less than a full term.

2. Section 73.2080 of the Commission's Rules requires that broadcast licensees refrain from discrimination and establish and maintain an EEO program which results in positive and continuing efforts to recruit, employ, and promote all qualified persons without regard to race, color, religion, national origin, or sex. As

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[1] As originally filed, the Coalition's petition to deny and informal objection also sought action against WDEL/WSTW(FM), Wilmington, Delaware, and WMBA, Ambridge, WBVP/WWKS(FM), Beaver Falls, WIXZ, McKeesport, and WYSP(FM), Philadelphia, all in Pennsylvania. Although the Coalition withdrew its challenge to the renewal of those stations' licenses, the Commission's staff, pursuant to delegated authority, reviewed the EEO programs of these stations and determined that the stations' EEO performance warranted no further inquiry. Similarly, the Coalition had challenged the license renewal applications for WKBO, Harrisburg, and WKPA, New Kensington and WYDD(FM), Pittsburgh, Pennsylvania. As to the former, the Commission's staff requested additional information which is now being analyzed. As to the latter two stations, the staff, pursuant to delegated authority, determined that the Coalition's charges raised no questions regarding the licensee's compliance with our EEO rules.

[2] The licensee of WNPV challenges the Coalition's standing, contending that WNPV cannot be heard throughout the City of Philadelphia. On the other hand, Ms. Phyllis Sims, chairperson of the Tri-State Black Media Coalition, alleges that she is a regular listener of the challenged Philadelphia area and Wilmington area stations. Given the above and the absence of an engineering affidavit which would render suspect Ms. Sims' claim, we are satisfied that the Coalition has established its standing. *See Baltimore Metropolitan Broadcast Stations*, 89 F.C.C. 2d 1183, 1184 (1982).

our decisions make clear, while we utilize a statistical comparison of a licensee's employment profile to the available labor force as an initial point of reference, the determinative factors in our assessment of a licensee's EEO compliance are the licensee's EEO program and good faith efforts to make that program work. *E.g., Alabama and Georgia Broadcast License Renewals*, 95 F.C.C. 2d 1 (1983).

3. Evaluation of the employment statistics and EEO programs of the instant stations leads us to conclude that no substantial and material questions of fact as to the licensees' qualifications exist. Accordingly, none of the applications are being designated for an evidentiary hearing. However, we believe that three of the stations have not diligently sought to ensure that minorities are fairly considered for station positions and that two of the stations should expand their recruitment efforts in order to increase their respective pool of minority applicants. Thus, we shall condition the grant of WAMS upon the submission of one EEO progress report and condition the grants of WBUX and WNPV upon the submission of revised EEO programs. An analysis of each station's performance follows:

(a) WILM, Wilmington, Delaware.

The Wilmington PMSA labor force includes 42.3% women and 13.9% minorities (12.0% blacks).[3] The station's final license term employment report lists thirty-one full-time employees, including fifteen (48.4%) women and three (9.7%) minorities, and twenty-seven upper-level employees, including eleven (40.7%) women and two (7.4%) minorities, both of whom were black. The Coalition notes that the station's prior license term employment reports reflect that minority employment in the upper-four job categories was outside the Commission's processing guideline.[4] Nonetheless, we are satisfied that the station had a positive continuing EEO program. That program shows that the station made recruitment contacts with eight organizations, four employment services, three educational institutions, and advertised in one publication, and that most of these efforts resulted in referrals. Consistent with this information, the station reported that during the period March 25, 1983 to March 9, 1984, it considered fifty-seven applicants, nine (or 15.6%) of whom were minorities, for twelve positions, two (or 16.7%) of which were filled by minorities. Considering the foregoing, the licensee's history of minority hiring and employment,[5] and the absence of any information suggesting that discrimi-

[3] Labor force figures for the Wilmington PMSA were obtained from "Report 3: Social Indicators for Planning and Evaluation — 1980 Census of Population" published by the Delaware Department of Labor.

[4] *See* Public Notice, FCC 80-61, 46 R.R. 2d 1693 (1980).

[5] Analysis of the station's employment reports, in conjunction with the licensee's EEO program and opposition pleading, reveals that at least six minorities were employed (and that five of these were hired) during the 1981-1984 license term.

nation against minorities occurred, we find that no administrative action or sanction is warranted.

(b) WAMS, Wilmington.

As noted, the Wilmington PMSA labor force includes 13.9% minorities. The station's three license term employment reports show a full-time staff which fluctuated from twenty-one in 1982 to sixteen in 1983 to seventeen in 1984, and an upper-level staff which declined from twenty in 1982 to sixteen in 1983 and 1984. While the station's employment profile for women falls within the guidelines, (*see* Appendix) none of its listed employees, in either a full-time or a part-time position, was a minority. However, as noted by the licensee, the station did employ minorities during the license term although because of the March reporting period used, none were listed. Minority employees named by the licensee are the station's community service director from February 1981 to February 1982, a lower-level employee from October 1981 to January 1982, an announcer in a part-time slot from June 1983 to December 1983, and a telephone sales person hired in July 1984.

According to the station's EEO program and the opposition filing, referrals were sought from eight different organizations but only a "few" resulted,[6] although twenty-five referrals are noted as having resulted from advertisements in the local newspaper. In addition, the EEO program reflects that the station had internship programs with three local educational institutions. However, there is no information as to how many interns participated. Finally, while the licensee points out that the station's license term hiring ratio for minorities (twenty-eight hires, three, or 10.7%, of whom were minorities) is not significantly different from the figure for minorities in the local labor force, it acknowledges that an insufficient number of minorities were in the applicant pool for available jobs. Consequently, it proposes to expand its recruitment sources to include "black organizations, which are active in the community."[7]

The licensee made efforts to, and did, in fact, employ minorities during the license term. Therefore, we see no reason to hold a hearing on this station's EEO compliance. However, it appears that the licensee did not continuously monitor the effectiveness of its recruitment efforts during the 1981–84 license term so as to ensure an adequate pool of job applications

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Moreover, we note that the station's employment reports for the years 1979 through 1981 reflect two blacks in full-time professional positions for each of those years. In view of the above, we believe that the 1982 report, which reflects no minorities in upper-level positions, was an anomaly.

[6] The licensee speculates that the small number of minority referrals is attributable to its location, which is said to be seven to eight miles outside of Wilmington in Greenville, Delaware, and its format (country and western music). Without further information, we are unconvinced that either of these facts adequate explains the number of minority referrals. *Community Tele-Communications, Inc.*, FCC 84–525, released December 5, 1984; *Renewals of Louisiana and Mississippi Broadcast Stations*, 94 F.C.C. 2d 275, 283 (1983).

[7] Two organizations are named as having been contacted subsequent to the filing of the station's renewal application, and this apparently led to the minority hire in July 1984.

from minorities. Minorities were absent from full-time positions during most of the license term, yet the licensee did not take significant steps to increase the likelihood of obtaining applications from minorities until after it had filed its 1984 renewal application. *See* note 7, *supra.* Accordingly, we believe it appropriate to monitor the licensee's efforts to assure ourselves that its new recruitment procedures are followed.[8] However, because these efforts apparently were begun by the licensee on its own initiative, we shall require only one report if the promised efforts are continued.[9]

(c) WBUX, Doylestown.

This station is located in Bucks County, one of the eight counties within the Philadelphia PMSA. That labor force includes 44.2% women and 19.2% minorities (15.1% blacks).[10] The station's 1984 renewal application employment report reveals a full-time staff of twelve employees (seven women), eleven (including six women) of whom are listed in upper-level positions, and a part-time staff of ten employees, but no minorities. Prior license term reports reveal similar profiles.[11] *See* Appendix. The station's EEO program indicates that several recruitment techniques were employed and that some thirty referrals, including fourteen from Temple University, resulted. However, none of the station's ten hires during the twelve-month reporting period (calendar year 1983) was a minority.

In responding to the Coalition's challenge, the licensee argues that its performance should not be measured against Philadelphia PMSA data but against Bucks County data. The licensee notes that its 1978 and 1981 renewal application EEO programs referenced Bucks County data and that the Commission's staff granted both applications. Further, the licensee observes that Bucks County includes less than 5% minorities and that Doylestown is approximately twenty-five miles from downtown Philadelphia.

As we have noted previously,[12] we use MSA labor force data as our initial frame of reference in analyzing a station's EEO performance when that station is located within the MSA, unless the station provides substantial justification for use of alternative data. Here, the licensee cites the station's location and the low percentage of minorities in its county as the principal reasons for use of county data.[13] However, this information does

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[8] *Media-Com, Inc.*, FCC 84-70, 55 R.R. 2d 1291, 1295-96 (1984); *Renewals of Indiana, Kentucky and Tennessee Broadcast Stations*, FCC 83-574, 54 R.R. 2d 1473, 1479-80 (1983).

[9] *Alabama and Georgia Broadcast License Renewals, supra* at 8.

[10] Labor force figures for the Philadelphia PMSA were obtained from the Pennsylvania Department of Labor and Industry's Office of Employment Security's "Labor Market Information for Affirmative Action Programs" (issued 1983).

[11] We are mindful, however, that the station's 1981 employment report showed a black person in a professional position.

[12] *E.g., Renewals of Indiana, Kentucky and Tennessee Broadcast Stations, supra* note 8, at 1484.

[13] The licensee also notes that in two prior renewal applications it relied on Bucks County data and that both of those applications were granted by the staff. However, we note that the licensee's 1981 renewal application profile was

not persuade us that the licensee cannot reasonably be expected to draw applicants from the City of Philadelphia. Indeed, the station's EEO program shows that approximately one-half of the station's applicant referrals came from Temple University, which is located near the center of Philadelphia. Accordingly, we are satisfied that the licensee has not provided adequate justification for use of Bucks County data.[14]

As noted, the station's record indicates that no minorities were employed there during the license term. In our view, this situation appears to have resulted in large part from the licensee's overly restrictive view of its labor recruitment area and the scope of its recruitment efforts, and not from intentional discrimination.[15] Hence, while we find that no substantial and material questions of fact exist, we believe that the licensee should make a greater effort to assure an adequate pool of minority applicants for every available job.[16] Accordingly, in order to assure ourselves of the licensee's compliance with our EEO rules, we shall direct it to submit a revised EEO program which details the steps it will take to generate job applications from minorities.

(d) WNPV, Lansdale

WNPV's situation is in many respects very similar to that of WBUX's. WNPV is located approximately twenty-two miles from downtown Philadelphia in Montgomery County, Pennsylvania, which is one of the constituent counties of the Philadelphia PMSA. As noted, the Philadelphia

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within our processing guidelines even when compared to the Philadelphia SMSA labor force. Further, we have consistently evaluated suburban stations like WBUX by reference to MSA labor force data. *See WPTW, Inc.*, FCC 84-297, released July 2, 1984.

[14] We wish to stress that use of PMSA data is merely the beginning point of the Commission's analysis. In considering this issue, we have taken into account a station's recruitment efforts in areas of minority population (*Media-Com, Inc., supra* note 8, at 1294), and a station's distance from centers of minority population (*id.*) and commuting difficulties from those locations. Letter from Glenn A. Wolfe, EEO Branch Chief for the FCC to M. Christopher Derick, dated February 15, 1985 (system allowed to use data for various counties rather than St. Louis PMSA data); letter from Glenn A. Wolfe, EEO Branch Chief for the FCC to Jerry Haines, Esquire, dated April 3, 1984 (station in Port Huron, Michigan may use St. Clair County data rather than Detroit PMSA data). In addition, we note that we will be considering this issue in the context of cable EEO. *See In re Amendment of Part of the Commission's Rules to Implement Equal Employment Opportunity Provisions of the Cable Communications Policy Act of 1984*, Notice of Proposed Rulemaking, FCC 85-102, MM Doc. No. 85-61, 50 Fed. Reg. 119191, March 20, 1985.

[15] We are satisfied that intentional discrimination against blacks is not the reason for the station's record. The station did employ a black person as a professional in 1981, and there have been no adverse findings made by any agency or court regarding discrimination.

[16] By way of example, the licensee notes that in filling a sales position in July 1984, it sent letters to the county branch of the NAACP, several educational institutions, including Temple, and other local agencies and organizations and that it placed advertisements in several newspapers of local interest. However, aside from its use of Temple, there is no indication that black persons residing in Philadelphia would have known that WBUX was seeking job applicants.

PMSA labor force includes 19.2% minorities. Review of the station's 1984 Annual Employment Report reveals that two (or 18.2%) of the station's eleven full-time employees (all of whom are classified in upper-level jobs) and two of the station's three part-time employees are women. None of the station's employees is a minority. Prior license term employment reports reflect nearly identical profiles. *See* Appendix. The station's EEO program indicates that the licensee has sought applicant referrals from three educational institutions and the state office of employment security and that it has placed advertisements in area general circulation newspapers and, occasionally, Broadcasting Magazine. However, the program does not indicate whether any referrals resulted, information that should have been provided. The program further shows that during the three-year period beginning January 1, 1981 and ending December 31, 1983, only seven persons were hired. Of those, three were women but none were minorities. Nonetheless, the licensee claims that it has attempted to recruit minorities and that it will continue to do so. The licensee points out that few minorities reside in its community of license, that it has had few hiring opportunities, and that it believes its failure to receive applications from minorities is a consequence of its distance from centers of minority population. Further, the licensee notes that in its 1981 renewal application it had relied upon Montgomery County labor force data,[17] that its 1981 profile was almost the same as its 1984 profile, and that its 1981 renewal application was granted by the Commission's staff. Given all of the above, the licensee contends that its EEO compliance should be viewed in light of Montgomery County labor force data.

As noted in our discussion of WBUX, one of the principal issues in our determination regarding the propriety of using PMSA labor force data in our analysis of suburban stations is whether the station appears to be reasonably accessible to the minority population in the PMSA.[18] If the station appears to be accessible, we will expect a licensee to use its best efforts to ensure adequate minority representation within the applicant pool, and we will measure EEO compliance, initially, by reference to PMSA labor force data. If on the other hand, the licensee demonstrates it is inaccessible or that despite substantial efforts applications from minorities are not forthcoming, we will use alternative labor force data.[19] Here, as noted, Lansdale is approximately 22 miles from downtown Philadelphia. It is linked to northwest Philadelphia by State Route 309, which, for 9 miles is a free limited access highway, while for the remaining 3 miles is a four-lane divided highway. Accordingly, because Lansdale appears to be reasonably accessible to areas of substantial minority population in both north and west Philadelphia, we believe it appropriate

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[17] The Bureau did not rely on Montgomery County labor force figures in renewing WNPV in 1981 but rather upon other information contained in the station's 1981 EEO program. That program revealed that the present licensee had operated the station for only about a short time, less than seven months, and had made only one new hire.

[18] *WPTW Radio, Inc., supra* note 13 and cases cited therein. *See also, Community Tele-Communications, Inc., supra* note 6.

[19] *See Renewals of Indiana, Kentucky and Tennessee Stations, supra* note 8, at 1484 n.41. *See also, supra* note 14.

at this time to begin our analysis of WNPV's EEO performance by reference to Philadelphia PMSA labor force data.

Like WBUX, WNPV neither hired nor employed minorities during the 1981-84 license term. While this situation may be attributable at least in part to the relatively small number of license term hires, the station demonstrates almost no effort to alert persons residing in Philadelphia about station job openings. As we have already held, such an approach is inappropriate. Hence, while we are satisfied that a hearing is unnecessary,[20] we are convinced that the licensee must expand its recruitment efforts to apprise minorities in Philadelphia of job openings in order that they are adequately represented in the applicant pool for all positions. Accordingly, we shall direct the licensee to submit a revised EEO program which details the steps it will take to generate job applications from minorities. Further, we advise the licensee that in the future it should submit all the information requested in the station's renewal application and EEO reports. *Baltimore Metropolitan Broadcast Stations, supra* note 2, at 1192.

4. Accordingly, IT IS ORDERED, that the petition to deny filed by the National Black Media Coalition and the Tri-State Black Media Coalition IS GRANTED to the extent indicated at paragraphs 6-8, *infra.*, and DENIED in all other respects.

5. IT IS FURTHER ORDERED, that the license renewal application for Station WILM IS GRANTED.

6. IT IS FURTHER ORDERED, that the license renewal applications for WAMS, WBUX and WNPV ARE GRANTED, subject to the EEO conditions specified in paragraphs 7 and 8 herein.

7. IT IS FURTHER ORDERED, that the licensees of WBUX and WNPV each file within thirty (30) days of the release of this Order an amended EEO program in accordance with paragraphs 3c and 3d of this Order.

8. IT IS FURTHER ORDERED, that the licensee of WAMS file an original and one copy of the following information on June 1, 1986: [21]

(a) a list of all job vacancies during the period from the date of adoption of this Order through the pay period used for the station's 1986 Annual Employment Report, indicating the job title and full or part-time status of

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[20] We are of the view that the number of hires noted (seven) over a three year period is too small a sample from which to draw an inference that any intentional discrimination occurred (*Mayor* v. *Educational Equality League*, 415 U.S. 605, 621 (1974); *Bilingual Bicultural Coalition on Mass Media, Inc.* v *F.C.C.*, 695 F.2d 621, 625 n.7 (D.C. Cir. 1978)), and we note that no adverse finding relative to discrimination has been made against the licensee.

[21] Upon submission of the report, the Commission will review the licensee's EEO performance, and if we determine that the licensee has developed an effective EEO program, no further reports will be required.

the position, the race or national origin, sex and referral source of each applicant for each job and the race or national origin and sex of the person hired (such a list might start: (1) D.J., part-time, white female, A.W.R.T.; white male, newspaper; black male, Urban League - selected white female);

(b) details concerning the station's efforts to recruit for each position filled during the period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment.

9. IT IS FURTHER ORDERED, That the Mass Media Bureau send by Certified Mail - Return Receipt Requested one copy of this Memorandum Opinion and Order to each of the parties to this proceeding.[22]

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

[22] The licensee may contact the EEO Branch of the Mass Media Bureau's Enforcement Division (202-632-7069) for information on the preparation of the employment report. In this regard, we advise the licensee that it need not submit the names of the persons referenced in its report.

Fairness Doctrine

On basis on a comprehensive record, Commission concluded fairness doctrine deserves the public interest. Commission found doctrine operates to inhibit presentation of controversial issues and questioned whether doctrine comports with First Amendment. As a result of explosive increase in information sources, Commission also determined the doctrine was no longer necessary to assure public had access to marketplace of ideas.
—*Fairness Doctrine*
MM Docket No. 84-282

Recognizing there are viable arguments on both sides of issue concerning whether or not fairness doctrine is codified, proposals to repeal doctrine are currently before Congress and Congress has intense interest in this policy, Commission decided not to eliminate or modify the doctrine. Despite its findings that doctrine deserves public interest, the FCC, deterred to Congressional perogative by providing Congress, its continuing review of doctrine, an opportunity to assess Commission's conclusions.
—*Fairness Doctrine*
MM Docket No. 84-282

Fairness Doctrine, Contrasting Viewpoint, Expression of

On basis of a comprehensive record, Commission determined the fairness doctrine in operation thwarts laudatory purpose it is designed to promote. Instead of furthering discussion of public issues, Commission found the doctrine inhibits b/cers from airing controversial issue programming. In addition, Commission expressed concern that administration of fairness doctrine has unintentionally resulted in stifling viewpoints which may be unorthodox, unpopular or unestablished.
—*Fairness Doctrine*
MM Docket No. 84-282

Fairness Doctrine, First Amendment, Effect on

Commission questioned whether fairness doctrine comports with First Amendment. While recognizing Supreme Court upheld the constitutionality of the doctrine in 1969, it opined that factual predicates underlying decision have been undermined. Commission found doctrine has a "chilling effect" on presentation of controversial issue programming. As a conse-

quence, it stated the doctrine, in its view, cannot be justified as necessary to assure access to marketplace of ideas.
—*Fairness Doctrine*
MM Docket 84-282

FCC 85-459

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees	Gen. Docket No. 84-282

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FCC 85-495

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees	Gen. Docket No. 84-282

REPORT
(Proceeding Terminated)

Adopted: August 7, 1985; Released: August 23, 1985

BY THE COMMISSION: *CHAIRMAN FOWLER ISSUING A SEPARATE STATEMENT; COMMISSIONER QUELLO CONCURRING AND ISSUING A STATEMENT; COMMISSIONER RIVERA NOT PARTICIPATING.*

I. Introduction

1. Before the Commission for consideration are the matters raised by the *Notice of Inquiry* in the above-captioned proceeding in which the Commission solicited comments on the statutory, constitutional, and policy implications underlying the fairness doctrine. Specifically, the Commission questioned whether the doctrine is constitutionally permissible under current marketplace conditions and First Amendment jurisprudence. Moreover, as a policy matter, the Commission inquired whether the doctrine remains necessary to further the governmental interest in an informed electorate and solicited comment on whether or not the doctrine, in operation, has an impermissible "chilling" effect on the free expression of ideas. Finally, the Commission queried whether the fairness doctrine is codified either by Sections 315 or by the general public interest standard embodied in the Communications Act.

[1] *Notice of Inquiry* in Gen. Docket No. 84-282, FC 84-140, 49 Fed. Reg. 20317 (May 14, 1984) [hereinafter cited as "*Notice*"].

2. More than one hundred parties submitted formal comments and reply comments in this proceeding.[2] Many other persons participated in this proceeding through the submission of informal comments. In addition, the Commission, *en banc*, on February 7 and 8, 1985, heard oral presentations on the issues raised by the *Notice*.

3. The fairness doctrine, as developed by the Commission, imposes upon broadcasters a two-pronged obligation. Broadcast licensees are required to provide coverage of vitally important controversial issues of interest in the community served by the licensees and to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues.[3] An examination of the genesis of the fairness doctrine reveals an evolutionary process, spanning a considerable period of time, and marked by a considerable uncertainty as to the proper approaches to insure that licensees operate in the public interest.[4] This inquiry is a further step in a continuing process in evaluating the fairness doctrine.[5] In undertaking this reexamination, we will first determine the purposes underlying promulgation of the fairness doctrine and then assess, in light of current market place conditions, whether or not its retention is consistent with the public interest.

4. Our past judgment that the fairness doctrine comports with the public interest was predicted upon three factors. First, in light of the limited availability of broadcast frequencies and the resultant need for government licensing, we concluded that the licensee is a public fiduciary, obligated to present diverse view-

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[2] A list of all the parties which filed formal comments and reply comments in this proceeding is contained in the attached Appendix.

[3] *Fairness Report* in Docket No. 19260, 48 FCC 2d 1 (1974), *recon. denied*, 58 FCC 2d 691 (1976), *aff'd sub nom. National Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978) ["hereinafter cited as "*1974 Fairness Report*"].

[4] For a detailed examination of the history of the fairness doctrine, *see Notice, supra* n.1.

[5] In light of the fact that "the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance" [*FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 810 (1978)], we have an affirmative duty periodically to reassess the wisdom of our rules, even those of long standing, and to determine whether or not they should be altered or even eliminated in light of changed circumstances. *See, e.g., NAACP v. FCC*, 682 F.2d 993 (D.C. Cir. 1982). The Supreme Court has recognized that "[r]egulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and pratices to the Nation's needs in a volatile, changing economy." *American Trucking Association, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 416, *reh. denied*, 389 U.S. 889 (1967). *See Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

points representative of the community at large. We determined that the need to effectuate the right of the viewing and listening public to suitable access to the marketplace of ideas justifies restrictions on the rights of broadcasters.[6] Second, we presumed that a governmentally imposed restriction on the content of programming is a viable mechanism—indeed the best mechanism—by which to vindicate this public interest.[7] Third, we determined, as a factual matter, that the fairness doctrine, in operation, has the effect of enhancing the flow of diverse viewpoints to the public.[8]

5. On the basis of the voluminous factual record compiled in this proceeding, our experience in administering the doctrine and our general expertise in broadcast regulation, we no longer believe that the fairness doctrine, as a matter of policy, serves the public interest. In making this determination, we do not question the interest of the listening and viewing public in obtaining access to diverse and antagonistic sources of information.[9] Rather, we conclude that the fairness doctrine is no longer a necessary or appropriate means by which to effectuate this interest. We believe that the interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the marketplace today and that the intrusion by government into the content of programming occasioned by the enforcement of the doctrine unnecessarily restricts the journalistic freedom of broadcasters. Furthermore, we find that the fairness doctrine, in operation, actually inhibits the presentation of controversial issues of public importance to the detriment of the public and in degradation of the editorial prerogatives of broadcast journalists.

6. We believe that the same factors which demonstrate that the

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[6] We stated that it is necessary to vindicate:

> . . . the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

Report of the Commission in Docket No. 8516, 13 FCC 1246, 1249 (1949) [hereinafter cited as "*1949 Fairness Report*"]. *See 1974 Fairness Report*, 48 FCC 2d at 2-3.

[7] *1974 Fairness Report*, 48 FCC 2d at 6.

[8] *Id.* at 7.

[9] As the Supreme Court has stated, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1966).

fairness doctrine is no longer appropriate as a matter of policy also suggest that the doctrine may no longer be permissible as a matter of constitutional law. We recognize that the United States Supreme Court, in *Red Lion Broadcasting Co. v. FCC*[10] upheld the constitutionality of the fairness doctrine. But in the intervening sixteen years the information services marketplace has expanded markedly, thereby making it unnecessary to rely upon intrusive government regulation in order to assure that the public has access to the marketplace of ideas. In addition, the compelling evidence adduced in this proceeding demonstrates that the fairness doctrine, in operation, inhibits the presentation of controversial issues of public importance; this fact impels the dual conclusion that the doctrine impedes the public's access to the marketplace of ideas and poses an unwarranted intrusion upon the journalistic freedom of broadcasters.

7. While we are firmly convinced that the fairness doctrine, as a matter of policy, disserves the public interest, the issue as to whether or not Congress has empowered us to eliminate the doctrine is not one which is easily resolved. The fairness doctrine evolved as an administrative policy promulgated by the Commission pursuant to congressionally delegated power. While we do not believe that the fairness doctrine is a necessary component of the general "public interest" standard contained in the Communications Act,[11] the question of whether or not Congress in amending Section 315 in 1959 codified the doctrine, thereby requiring us to retain it, is more problematic. In any event, the fairness doctrine has been a longstanding administrative policy and central tenet of broadcast regulation that Congress has chosen not to eliminate. Moreover, there are proposals pending before Congress to repeal the doctrine. As a consequence, we believe that it would be inappropriate at this time for us to either eliminate or significantly restrict the scope of the doctrine. Instead, we will afford Congress an opportunity to review the fairness doctrine in light of the evidence adduced in this proceeding.

II. The Constitutionality of the Fairness Doctrine is Suspect

8. As we stated in the *Notice*,[12] the fairness doctrine, as a governmentally imposed regulation affecting the content of

[10] 395 U.S. 367 (1969).
[11] 47 U.S.C. § 309 (1982).
[12] *See Notice, supra* n.1 at ¶¶81-95.

speech, has significant constitutional ramifications. Because "the 'public interest' standard necessarily invites reference to First Amendment principles,"[13] it is appropriate for us to consider the constitutional implications of the doctrine.

9. The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be inhibited, robust, and wide-open. . . ."[14] As Justice White noted in *Miami Herald v. Tornillo*:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.[15]

10. The means chosen by the Founders to promote the free discussion of public issues was to prohibit the government from intruding into the marketplace of ideas. As the Supreme Court has stated, "the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' "[16] The framers of the First Amendment proscribed the government from placing its official imprimatur on any particular viewpoint; they presumed that the marketplace of ideas would flourish best without the necessity or danger of governmental intervention.[17]

11. Under the First Amendment the expression of opinion on matters of public concern "is entitled to the most exacting degree of First Amendment protection."[18] As the United States Supreme

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[13] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973). *See also American Security Council Education Foundation v. FCC*, 607 F.2d 438, 443 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980).

[14] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

[15] 418 U.S. 241, 259 (1974), *quoting Mills v. Alabama*, 384 U.S. 214, 218-19 (1969) (White J., concurring).

[16] *Bridges v. California*, 314 U.S. 252, 263 (1941). As Justice Potter Stewart has stated:

> Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believe that "fairness" was too fragile to be left for a government bureaucracy to accomplish.

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 145 (Stewart, J., concurring).

[17] The United States Supreme Court has stated that "in the realm of ideas [the Constitution] protects expression which is eloquent no less than that which is unconvincing." *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 360 U.S. 684, 689 (1959).

[18] *FCC v. League of Women Voters of California*, _____U.S. _____, 104 S. Ct. 3106, 3115 (1984). *See First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77, *reh. denied*, 438 U.S. 907 (1978); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

Court has stated, the "[d]iscussion of public issues . . . are integral to the operation of the system of government established by our Constitution,"[19] and, therefore, essential to an informed democratic citizenry.[20] In addition, as Justice Brennan has recently observed, a "general proscription against unnecessarily broad content-based regulation permeates First Amendment jurisprudence."[21]

12. The United States Supreme Court upheld the constitutionality of the fairness doctrine in *Red Lion Broadcasting Co. v. FCC*,[22] "despite the general [F]irst [A]mendment prohibition on government regulation of speech and of the press"[23] because the Court, at that time, perceived that the doctrine furthered "the paramount [F]irst [A]mendment right of viewers and listeners to receive 'suitable access to . . . ideas and experiences.' "[24] For several reasons, however, the Court's decision in *Red Lion*, was narrowly circumscribed. First, in its opinion, the Court expressly stated that its holding did not constitute approval of every aspect of the fairness doctrine.[25] Second, relying upon our representation that there was no validity to the contention that the fairness doctrine, in operation, lessens the coverage of controversial issues on the nation's airwaves,[26] the Court asserted that

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[19] *Buckley v. Valeo*, 424 U.S. at 14.

[20] The United States Supreme Court has recently reaffirmed that:

> It is speech on 'matters of public concern' that is "at the heart of the First Amendment's protection.' *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), *quoting Thornhill v. Alabama*, 310 U.S. 88, 101 (1940). As we stated in *Connick v. Myers*, 461 U.S. 138, 145 (1983), .. "the Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 445, 467 (1980)."

Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc., _____U.S. _____, 53 U.S.L.W. 4866, 4869 (U.S. June 26, 1985) (No. 83-18).

[21] *Id.* at 4874 (Brennan, J., dissenting). *See also Banzhaf v. FCC*, 405 F.2d 1082, 1100 (D.C. Cir. 1968), *cert. denied sub nom. American Broadcasting Companies v. FCC*, 396 U.S. 842 (1969) ("The First Amendment is unmistakably hostile to governmental controls over the content of the press").

[22] *Red Lion Broadcasting Co. v. FCC*, *supra* n.10.

[23] *American Security Council Education Foundation v. FCC*, 607 F.2d at 443-44.

[24] *Id.*, *quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 389-90 (ellipses in original).

[25] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 396.

[26] In *Red Lion*, the Court stated that if broadcasters'

> . . . coverage of controversial public issues will be eliminated or at least rendered wholly ineffective [by the doctrine] [s]uch a result would indeed be a serious matter, for . . . the purposes of the doctrine would be stifled.
>
> At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative.

> if experience with the administration of these doctrines indicates that they have the net affect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.[27]

Third, the Court's decision was necessarily premised upon the broadcasting marketplace as it existed more than sixteen years ago.[28]

13. As a consequence, serious questions regarding the constitutionality of the fairness doctrine continued in spite of the Supreme Court's decision in *Red Lion*. Indeed, as the United States Court of Appeals stated in referring to that decision:

> [d]espite this holding, important constitutional questions continue to haunt this area of the law. The doctrine and the rule do, after all, involve the Government to a significant degree in policing the content of communication . . . [and there are] abiding First Amendment difficulties. . . .[29]

14. Subsequent to *Red Lion*, the Court in *Miami Herald Publishing Co. v. Tornillo*[30] invalidated, on First Amendment grounds, a Florida statute which gave political candidates a right to reply to criticisms and attacks by a newspaper. In that case the Court, in a unanimous opinion, determined that the inevitable effect of a governmentally imposed right of reply requirement would be to reduce the amount of controversial issues of public importance presented in the press. The Court concluded that:

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid

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Id. at 393. *See also American Security Council Education Foundation v. FCC*, 607 F.2d at 444.

[27] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 393. Similarly, the United States Court of Appeals has stated that "[i]f the fairness doctrine cannot withstand First Amendment scrutiny, the reason is that to insure a balanced presentation of controversial issues may be to insure no presentation, or no vigorous presentation, at all." *Banzhaf v. FCC*, F.2d at 1102-03.

[28] As the Supreme Court has recognized:

> Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty. . . . The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence.

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 102.

[29] *Straus Communications, Inc. v. FCC*, 530 F.2d 1001, 1008 (D.C. Cir. 1976).

[30] *Miami Herald Publishing Co. v. Tornillo, supra* n.15.

> controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate."[31]

Indeed, the Court, in *Miami Herald*, intimated that the regulatory requirements that we impose may be even more inhibiting than those contained in the "right of reply" statute because print journalists are not "subject to the finite technological limitations of time that confront a broadcaster. . . ."[32]

15. In *FCC v. League of Women Voters*[33] the Court has recently reaffirmed that the constitutional permissibility of the fairness doctrine is predicated upon a factual presumption that the doctrine has the effect of enhancing the coverage of controversial issues available to the viewing and listening public. Indeed, the Court stated that it would be obligated to reevaluate the constitutionality of the doctrine if the Commission demonstrated the falsity of this assumption.[34] In addition, the Court indicated that it may be willing to reassess the constitutional standards traditionally applied in broadcast regulation. The Court stated that:

> The prevailing rationale for broadcast regulation based upon spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. *See, e.g.*, Fowler & Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207, 221-226 (1982). We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.[35]

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[31] *Id.* at 257, *quoting New York Times Co. v. Sullivan*, 376 U.S. at 279.

[32] *Id.* at 256-57.

[33] *FCC v. League of Women Voters of California, supra* n.18.

[34] The Court asserted that:

> As we recognized in *Red Lion*, however, were it to be shown by the Commission that the fairness doctrine "has the effect of reducing rather than enhancing" speech, we would then be *forced* to reconsider the constitutional basis of our decision in that case.

Id. at 3117 n.12, *quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 393 (emphasis added).

[35] *Id.* at 3116 n.11. The United States Court of Appeals has also indicated that the proliferation of broadcast outlets may affect the extent to which the speech of broadcasters is protected by the First Amendment:

> [t]oday when the number of broadcast stations not only far exceeds the number when the Communications Act was adopted and the number when

Our reading of this language is that the decision in *Red Lion*, as well as the level of constitutional scrutiny applied to content regulation of broadcast speech, could change if the factual predicates which the Supreme Court relied upon in that case have changed. As a consequence, while we recognize that the Supreme Court's decision in *Red Lion* is controlling law unless the Court expressly states otherwise, we do not agree with the position of some commenters that the mere recitation of the Court's decision in *Red Lion* is sufficient to definitively resolve the complex constitutional issues presented by the doctrine.[36]

16. We now turn to identifying the standard of review appropriate to restraints on broadcast speech. In ascertaining whether or not a particular broadcast regulation comports with the First Amendment, the United States Supreme Court historically has applied standards which are different from those governing "the traditional free speech case."[37] Specifically, the Court has asserted that the utilization by the broadcast media of a public resource justifies the application of what it characterizes as "an unusual order of First Amendment values."[38] Under this bipartite standard, the interest of the public under the First Amendment is paramount.[39] The second part of this standard recognizes the

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the *National Broadcasting Co.* case was decided and rivals and perhaps surpasses the number of newspapers and magazines in which political messages may effectively be carried, it seems unlikely that the First Amendment protections of broadcast political speech will contract further, and they may well expand.

Loveday v. FCC, 707 F.2d 1443, 1459 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 1907 (1984); *See also Banzhaf v. FCC, supra* n.21; *Quincy Cable, TV Inc. v. FCC*, No. 83—1283 (D.C. Cir. July 19, 1985).

[36] Similarly, we do not believe that the mere fact that the fairness doctrine is a regulation of long-standing makes it invulnerable to First Amendment challenge. The United States Court of Appeals has stated that:

> It may well be that some venerable FCC policies cannot withstand constitutional scrutiny in light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets.

Banzhaf v. FCC, 405 F.2d at 1100.

[37] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 101.

[38] *Id.*

[39] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390. Contrary to the position of some commenters (*see, e.g.*, Reply Comments of Ecumedia) the general public has no First Amendment right to speak on broadcast frequencies. *See, e.g., Columbia Broadcasting System, Inc. v. Democratic National Committee, supra* n.13. The juxtaposing of speakers' and listeners' rights provides an important underpinning of the framework the Supreme Court has employed in analyzing constitutional constraints in the broadcast regulatory area. It suggests that some lessening of the rights of one group (speakers) is necessary to increase the

substantial rights of broadcasters under the First Amendment.[40] As the Court has recently stated, "broadcasters are 'entitled under the First Amendment to exercise 'the widest journalistic freedom consistent with their public [duties].' "[41] Indeed, restrictions on the First Amendment rights of broadcasters are upheld only if these are found to be narrowly tailored regulations necessary to vindicate the public's paramount right to receive information essential to a functional democracy.[42] This standard of review appears to have left broadcast speech in a position of protection less favorable than the printed media. This dichotomy is vividly presented by comparing the *Red Lion* and *Miami Hearald* cases, decided within five years of each other. Had the *Red Lion* court required of the Commission a showing of compelling state interest, as it required of the state of Florida in *Miami Herald*, it is doubtful that the fairness doctrine would have survived. But the *Red Lion* court found that scarcity and its effects had made a licensing scheme necessary and went on to conclude that that scheme afforded broadcasters a standard of review less protective than that accorded the print media.[43]

17. In light of the significant changes that have occurred in the communications marketplace, a number of commenters have taken

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rights of another (listeners and viewers). While such an analysis initially appears to provide a useful insight into why broadcast licensees receive differential treatment under the First Amendment, it conflicts fundamentally with what would appear to be the historic philosophy underlying the First Amendment. That is, that it is through the protection of the rights of speakers that the interest of society as a whole will best be protected.

[40] *See, e.g., Columbia Broadcasting System, Inc. v. Democratic National Committee, supra* n.13; *League of Women Voters of California v. FCC*, 104 S.Ct. at 3116-17.

[41] *FCC v. League of Women Voters of California*, 104 S.Ct. at 3116-17, *quoting CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981), *quoting Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 110.

[42] *Id.* at 3118.

[43] Although *Red Lion* was a unanimous decision, Justice William O. Douglas did not participate and four years later wrote "[m]y conclusion is that TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 148. (Douglas, J., concurring). Justice Douglas added, "I did not participate in that decision [*Red Lion*] and, with all respect, would not support it. The Fairness Doctrine has no place in our First Amendment regime." *Id.* at 154. And compare:

> We have been beginning, so to speak, in the wrong corner. The question is not what does the need for licensing permit the Commission to do in the public interest; rather it is what does the mandate of the First Amendment inhibit the Commission from doing even though it is to license.

H. Kalven, Jr., "Broadcasting, Public Policy and the First Amendment," 10 J.L. & Econ. 15, 37 (1967).

the position that the application of a disparate First Amendment standard to cases involving broadcast journalists is no longer appropriate. These parties argue that the constitutionality of the fairness doctrine and other cases involving broadcast journalists should be evaluated under the general constitutional standards that apply to the print media.[44] We would agree that the courts may well be persuaded that the transformation in the communications marketplace justifies the adoption of a standard that accords the same degree of constitutional protection to broadcast journalists as currently applies to journalists of other media. We do not believe, however, that it is necessary or appropriate for us to make that determination in this proceeding.

18. Administrative agencies are not tasked with the duty to adjudicate the constitutionality of a federal statute.[45] For the reasons set forth in detail below,[46] the issue as to whether or not the fairness doctrine is codified is not one which is susceptible of an easy resolution. Moreover, we are mindful that it is the province of the federal judiciary — and not this Commission — to interpret the Constitution.[47] We do not purport, therefore, to definitively resolve whether or not the fairness doctrine is constitutional. However, for several reasons we believe that it is appropriate for us to state our opinion on this issue. First, as noted above, constitutional considerations are an integral component of the public interest standard and we believe that an evaluation of the constitutionality of the doctrine is necessary in order to make a meaningful evaluation as to whether or not retention of the doctrine is in the public interest. Second, as the expert administrative agency charged by the Congress with the day-to-day implementation of broadcast regulation, we believe that our opinions on these matters provide a unique perspective which may prove useful.[48] Third, as noted above, in upholding the

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[44] *See generally* ¶¶ 9-11, *supra.*

[45] As the United States Supreme Court has stated, "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Johnson v. Robison*, 415 U.S. 361, 368 (1974), *quoting Oestereich v. Selective Service Board*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring in result). *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975).

[46] *See* Section V, *infra.*

[47] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

[48] The Supreme Court has stated that "in evaluating First Amendment claims . . . we must afford great weight to the . . . experience of the Commission." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 102. Moreover, in *FCC v. League of Women Voters of California*, the Court indicated that it may reevaluate the standard utilized in First Amendment cases if, *inter alia*, the Commission provides it with a "signal" that

constitutionality of the fairness doctrine in the *Red Lion* decision, the Supreme Court relied upon our representation that the fairness doctrine did not operate to inhibit the coverage of controversial issues of public importance; the evidence in this proceeding, however, compels the conclusion that this assumption is no longer valid.

19. We believe that there are serious questions raised with respect to the constitutionality of the fairness doctrine whether or not the Supreme Court chooses to continue to apply the less exacting standard which it has traditionally employed in assessing the constitutionality of broadcast regulation. As demonstrated *infra*, the compelling evidence in this proceeding demonstrates that the fairness doctrine, in operation, inhibits the presentation of controversial issues of public importance. As a consequence, even under a standard of review short of the strict scrutiny standard applied to test the constitutionality of restraints on the press, we believe that the fairness doctrine can no longer be justified on the grounds that it is necessary to promote the First Amendment rights of the viewing and listening public. Indeed, the chilling effect on the presentation of controversial issues of public importance resulting from our regulatory policies affirmatively disserves the interest of the public in obtaining access to diverse viewpoints. In addition, we believe that the fairness doctrine, as a regulation which directly affects the content of speech aired over broadcast frequencies, significantly impairs the journalistic freedom of broadcasters. As set forth in detail below, in light of the substantial increase in the number and types of information sources, we believe that the artificial mechanism of interjecting the government into an affirmative role of overseeing the content of speech is unnecessary to vindicate the interest of the public in obtaining access to the marketplace of ideas. Were the balance ours alone to strike, the fairness doctrine would thus fall short of promoting those interests necessary to uphold its constitutionality. And because the constitutionality of the fairness doctrine, in our view, is suspect under the less searching broadcast standard of review, *a fortiori*, it would prove constitutionally infirm under the more stringent First Amendment standard applicable in cases involving the print media.[49]

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technological advancements warrant such a reevaluation. *League of Women Voters*, 104 S. Ct. at 3116 n.11.

[49] Indeed, in light of the Supreme Court's decision in *Miami Herald Publishing Co. v. Tornillo*, *supra* n.15, it is clear that the fairness doctrine would not be constitutional were the Court to apply the general First Amendment standards

20. A number of commenters have argued that the limited availability of the electromagnetic spectrum is sufficient to justify the fairness doctrine. For example, the Media Access Project and the Telecommunications Research and Action Center ("MAP/TRAC") argue that:

> The most important justification for the fairness doctrine is that there are more individuals who want to broadcast than there are broadcast frequencies for the Commission to allocate. This continuing outstripping of supply by demand is the basis of the so-called "scarcity" rationale.[50]

While it is true that the limited availability of the electromagnetic spectrum may constitute a *per se* justification for certain types of government regulation, such as licensing, it does not follow that all other types of governmental regulation, particularly rules which affect the constitutionally sensitive area of content regulation, are similarly justified. As the United States Court of Appeals stated:

> First Amendment complaints against FCC regulation of content are not adequately answered by mere recitation of the technically imposed necessity for *some* regulation of broadcasting and the conclusory propositions that "the public owns the airwaves" and that a broadcast license is a "revocable privilege."[51]

21. In sum, while we recognize that the United States Supreme Court found that the fairness doctrine was constitutionally permissible sixteen years ago, we believe that the transformation of the broadcast marketplace and the compelling documentation of the "chilling effect" undermine the factual predicate of that decision. We will now specifically address the factors which, in our view, mandate a reassessment of our historical position that the fairness doctrine is consistent with the public interest.

III. A Number of Factors Justify a Reassessment of the Fairness Doctrine

A. The Need for and Costs of the Fairness Doctrine and its Actual

governing the print media.

[50] "Comments of Media Access Project and Telecommunications Research and Action Center" at 61 [hereinafter cited as "MAP/TRAC Comments"].

[51] *Banzhaf v. FCC*, 405 F.2d at 1100 (emphasis in original) (footnotes omitted). Indeed, notwithstanding its express recognition of the limited availability of the elctromagnetic spectrum in *FCC v. League of Women Voters of California*, the Court invalidated a statutory prohibition on editorializing by funded, non-commercial broadcast stations on the grounds that the statute violated the First Amendment rights of broadcasters. *FCC v. League of Women Voters of California*, *supra* n.18.

Effect on the Coverage of Controversial Issues of Public Importance.

22. As we stated in our *Notice*, the purpose in instituting this inquiry was to undertake a "searching and comprehensive reexamination of the fairness doctrine . . . ."[52] This reappraisal will consist of three parts: an exploration as to whether the doctrine furthers or impedes the regulatory and constitutional objectives it seeks to promote, an assessment of the potential costs and other detriments which may arise from the operation of the doctrine and an evaluation as to whether or not the communications marketplace has undergone such a transformation that the doctrine is no longer warranted or supportable.

23. As we stated above, the historic justification of the retention of the fairness doctrine, as a matter of policy, has been that government regulation is necessary to assure access to the "widest possible dissemination of information from diverse and antagonistic sources,"[53] to the listening and viewing public. While we have historically expressed our belief that the fairness doctrine, in operation, had the effect of expanding coverage of controversial issues on the nation's airwaves,[54] we have never specifically made an empirical assessment as to the efficacy of this chosen regulatory mechanism to promote access by the public to the marketplace of ideas. As a consequence, in this proceeding, we believe that it is essential to undertake a detailed evaluation as to whether or not the fairness doctrine in operation, enhances or inhibits the presentation of diverse views on public issues. In undertaking this evaluation, we will assess both the potential for the doctrine to chill the speech of broadcasters and review the

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[52] *Notice*, *supra* n.1. at ¶¶4.

[53] *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *1974 Fairness Report*, 48 FCC 2d at 3.

[54] *1974 Fairness Report*, 48 FCC 2d at 7. We have, however, always recognized the dangerous potential that the fairness doctrine, in operation, could have a "chilling effect" on the coverage of controversial issues of public importance. In fact, in the *1974 Fairness Report*, we stated that:

> there exists within the framework of fairness doctrine administration and enforcement the potential for undue governmental interference in the processes of broadcast journalism, and the concomitant diminution of the broadcaster's and the public's First Amendment interests.

Id. at 6. We have also indicated that if it were shown in actual operation that the doctrine either unnecessarily restricted the journalistic freedoms of broadcasters or impeded the right of the public to obtain access to diverse viewpoints on public issues, we would be compelled to reassess the policy. *See Notice of Inquiry* in Docket No. 19260, 30 FCC 2d 26, 28 (1971).

actual evidence presented by the commenting parties to determine whether the fairness doctrine impedes or inhibits access by the public to the marketplace of ideas.

24. Because a meaningful evaluation of an administrative policy necessarily involves an assessment of regulatory burdens, we shall also evaluate the costs and other potential detriments directly and indirectly borne by broadcasters, the Commission and the public at large which arise from the operation of the fairness doctrine. These costs do not merely include financial expenses but may also involve a restriction of cherished First Amendment values and an increased danger of government abuse.

25. Finally, in our comprehensive reappraisal of the fairness doctrine, we shall determine whether active government intervention in this constitutionally sensitive area involving content regulation is necessary or appropriate in promoting access to the marketplace of ideas. In determining whether or not there is a need to retain the fairness doctrine, we shall initially assess the nature and scope of the relevant market and then evaluate the sufficiency of antagonistic viewpoints available to the public in that market. We are particularly interested in ascertaining whether there have been significant changes in the number and variety of information sources available to the public which would attenuate the need for an artificial regulatory mechanism to assure that the public has access to diverse viewpoints on controversial and important issues.

B. The Fairness Doctrine in Operation Lessens the Amount of Diverse Views Available to the Public

1. Broadcasters Perceive That the Fairness Doctrine Involves Significant Burdens

26. A licensee may be inhibited from presenting controversial issues of public importance by operation of the fairness doctrine even though the first prong of that doctrine affirmatively requires the licensee to broadcast such issues.[55] The reason underlying this apparent paradox is that the two parts of the fairness doctrine differ markedly in the scope of the controversial issues that they encompass, the ease by which a licensee can meet the requirements embodied in the two prongs and the degree to which the

[55] Under the first prong of the fairness doctrine the licensee is required to provide coverage of controversial issues of vital importance to the community. *See, e.g., Friends of the Earth*, 24 FCC 2d 743, 750–51 (1970); *1974 Fairness Report*, 48 FCC 2d at 9–10; *Representative Patsy Mink*, 59 FCC 2d 987 (1976).

Commission, in the past, has taken affirmative action to enforce compliance with them.

27. It is well-established that a licensee, in complying with the first prong of the fairness doctrine, has broad discretion in determining the specific controversial issues of public importance that it chooses to present.[56] Indeed, in our *1974 Fairness Report*, we stated that "we have no intention of becoming involved in the selection of issues to be discussed, nor do we expect a broadcaster to cover each and every important issue which may arise in his community."[57] Rather, with respect to the affirmative obligation to cover controversial issues of public importance "[a] presumption of compliance exists"[58] and only "in *rare instances*, where a licensee has failed to give coverage to an issue found to be of critical importance to its particular community, would questions be raised as to whether a licensee had fulfilled its fairness obligations."[59] Indeed, the United States Court of Appeals has characterized this requirement as one which is "not extensive and [can be] met by presenting a minimum of controversial subject matter."[60]

28. In contrast to the paucity of challenges under the first part of the fairness doctrine, "[t]he usual fairness complaint . . . concerns a claim that the licensee has presented one viewpoint on a 'controversial issue of public importance' and has failed to afford a 'reasonable opportunity for the presentation of contrasting viewpoints.' "[61] The responsive programming obligation embodied in the second prong of the fairness doctrine arises whenever the licensee airs any controversial issue of public importance, even in situations where the issue broadcast is not

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[56] *See, e.g., 1949 Fairness Report*, 13 FCC at 1251.

[57] *1974 Fairness Report*, 48 FCC 2d at 10.

[58] *Memorandum Opinion and Order* in BC Docket No. 78-60, 89 FCC 2d 916, 925 (1982) (emphasis added).

[59] *Brent Buell*, 97 FCC 2d 55, 57 (1984) (emphasis added). *See Memorandum Opinion and Order* in BC Docket No. 78-60, 89 FCC 2d at 925; *1974 Fairness Report*, 48 FCC 2d at 10. As the United States Court of Appeals has stated:

> Throughout the history of fairness doctrine enforcement, much more attention has been given to th[e] second obligation — the provision of opposing points of view on controversial issues about which only one viewpoint has been broadcast — than to the first, namely, the affirmative obligation to provide coverage of controversial and important issues. The FCC has only once sustained a complaint relating to the part one obligation.

National Citizens Committee for Broadcasting v. FCC, 567 F.2d 1095, 1100 n.13 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).

[60] *American Security Council Education Foundation v. FCC*, 607 F.2d at 444.

[61] *1974 Fairness Report*, 48 FCC 2d at 10.

"so critical or of such great public importance"[62] to trigger a requirement under the first part of the fairness doctrine.[63] An overwhelming majority of the complaints we receive and virtually all our orders directing licensees to take corrective action to conform to the requirements of the fairness doctrine involve the second prong of that doctrine.[64]

29. As a result of the asymmetry between its two components, the fairness doctrine in its operation encourages broadcasters to air only the minimal amount of controversial issue programming sufficient to comply with the first prong. By restricting the amount and type of controversial programming aired, a broadcaster minimizes the potentially substantial burdens associated with the second prong of the doctrine while remaining in compliance with the strict letter of its regulatory obligations.[65] Therefore, despite the first prong obligation, in net effect the fairness doctrine often discourages the presentation of controversial issue programming.[66]

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[62] *Id.*

[63] As the Court of Appeals has stated

> . . . issues giving rise to the part two obligation would not necessarily be required to be covered under the first obligation; the threshold which triggers the second fairness obligation is lower than that which triggers the first.

National Citizens Committee for Broadcasting v. FCC, 567 F.2d at 1100 n.13.

[64] *See generally* n.59, *supra.*

[65] One commentator has noted that:

> [L]icensees risk more by providing programming on controversial issues than by ignoring such issues; in only one case in the FCC's history has a complaint relating to the coverage requirement been resolved against a licensee. Hence, licensees are likely to assume that it is safer to ignore the coverage requirement than to risk balancing complaints. . . .
>
> [This] can only have the effect of encouraging licensees to avoid all but the most significant community concerns, discouraging the open debate of many important issues.

B. Chamberlin, "The FCC and the First Principle of the Fairness Doctrine: A History of Neglect and Distortion," 31 Fed. Comm. L.J. 361, 408-09 (1979) (footnotes omitted). *See also American Security Council Education Foundation v. FCC*, 607 F.2d at 459 n.5 (Bazelon, J., concurring).

[66] We do not believe that more stringent enforcement of the first prong would be an appropriate remedial response to the existence of a "chilling effect." Indeed, such an approach increases the severity of major detriments associated with the fairness doctrine. For example, contrary to the principles of the First Amendment, a stricter regulatory approach would increase the government's intrusion into the editorial decisionmaking process of broadcast journalists. It would enlarge the opportunity for governmental officials to abuse the doctrine for partisan political purposes. Were the chilling effect of the government sanction removed, the result might well be greater coverage of issues and thus more satisfaction of the policy behind the fairness doctrine's first prong. Moreover, a more stringent enforcement of first prong obligations would merely

30. There are a variety of reasons why a broadcaster might be inhibited from providing comprehensive coverage of controversial issues of public importance by operation of the fairness doctrine. One reason is the fear of government sanction. Under our regulatory scheme, a braodcaster must obtain a license from the Commission prior to entry into the broadcast field.[67] Because broadcast licenses are granted only for limited periods of time, all broadcasters must periodically renew that license if they wish to remain in business.[68] Compliance with the fairness doctrine is an important consideration in our determination as to whether renewal of a broadcast license is in the public interest.[69] Indeed, we have characterized the "strict adherence to the fairness doctrine .... as the *sine qua non* for grant of a renewal of license."[70]

31. Because a decision by this Commission to deny the renewal of a broadcast license is "a sanction of tremendous potency"[71] which can be triggered by a finding by this Commission that the licensee failed to comply with the fairness doctrine, a licensee has the incentive to avoid even the potential for such a determination.[72] Therefore, in order to attenuate the possibility that opponents, in a renewal proceeding, will challenge the manner in which a licensee provides balance with respect to the controversial issues it chooses to cover, a broadcaster may be inhibited from presenting controversial issue programming in excess of the minimum required to satisfy the first prong of the fairness doctrine.[73] As Chief Judge David Bazelon has stated, "[w]hen the

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increase the economic costs that are borne both by broadcasters and the Commission.

[67] 47 U.S.C. § 301 (1982).

[68] Section 307(c) of the Communications Act prohibits the Commission from granting a television license for a period exceeding five years or a radio license for a period in excess of seven years. 47 U.S.C. § 307(c) (1982).

[69] *See* 47 U.S.C. § 309 (1982).

[70] *Committee for the Fair Broadcasting of Controversial Issues*, 25 FCC 2 2d 283, 292 (1970); *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 944, 1008 (D.C. Cir. 1966) (Burger, C. J.). *See also 1974 Fairness Report*, 48 FCC 2d at 10.

[71] *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642, 666 (D.C. Cir. 1971), *rev'd sub nom. Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) (McGowan, J., dissenting).

[72] As Judge Leventhal recognized, "[f]airness rulings raise the problem of a chilling effect on broadcast journalism; the licensee "faces the possibility that the [controversial programming] will haunt [its] renewal applications." *National Broadcasting Company, Inc. v. FCC*, 516 F.2d 1180 (D.C. Cir. 1975), *cert. denied*, 436 U.S. 926 (1976) (Leventhal, C.J. concurring in part and dissenting in part).

[73] The evidence of record from a fairness doctrine supporter demonstrates that organizations have effectively used the threat of license revocation in fairness

right to continue to operate a lucrative broadcast facility turns on periodic government approval, even a governmental 'raised eyebrow' can send otherwise intrepid entrepreneurs running for the cover of conformity."[74]

32. While denial of a license renewal is the most severe sanction we can impose for failure to abide by the fairness doctrine,[75] it is not the only sanction.[76] Typically, upon a finding that a licensee has violated the fairness doctrine, we order the broadcaster to provide additional programming in order to redress the imbalance in time and frequency given to one side of a controversial issue.[77] Since broadcast time is a valuable resource, such a requirement

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doctrine negotiations in order to pressure broadcasters to give them air time for their specific programming. The Public Media Center ("PMC"), an organization which utilizes the fairness doctrine "to help various organizations secure air time for the expression of their views via the electronic media," ["Comments of the Public Media Center" at 1, n.1 (hereinafter cited as "PMC Comments")] has recounted one such instance in which an anti-nuclear coalition sought to obtain free advertising time from broadcast stations in order to present its views on a nuclear dumping controversy. PMC stated that:

> COND [the anti-nuclear coalition] made it clear that a Petition to Deny License Renewal would be filed if the fairness doctrine question went unresolved. *While it's unlikely the FCC would pull a license solely because of a fairness violation, most stations will do everything they can to avoid any kind of license challenge.* The cost of fighting a Petition to Deny is, after all, much higher the price of complying.

Id. at 14. (emphasis added). Although the stations offered to present the anti-nuclear viewpoint by means of a talk show, the coalition took the position that this offer was insufficient; instead it demanded that the responsive programming requirement of the fairness doctrine be met by the broadcast of specific spot advertising prepared by them. *Id.* at 14. The stations ultimately acceded to the coalition's demand. As PMC admitted, it was "[t]he implied threat of a license renewal challenge [which] increased the stations' desire for a negotiated settlement." *Id.* at 15.

[74] D. Bazelon, "The First Amendment and the 'New Media'—New Directions in Regulating Telecommunications," 31 Fed. Comm. L.J. 201, 206 (1979).

[75] A number of parties disagree that the power of the Commission to refuse to renew a station license has an inhibiting effect because the exercise of this power is sparingly used. For example, MAP/TRAC contend that "[l]icensees do not lose licenses for violation of the fairness doctrine in the coverage of an issue and the Commission knows it." MAP/TRAC Comments, *supra* n.50 at 137. We disagree. First, contrary to MAP/TRAC's assertion, we have in fact denied a license renewal on the basis of a fairness doctrine violation. *Brandywine Main-Line Radio, Inc.* 24 FCC 2d 18 (1970), *reconsideration denied*, 27 FCC 2d 565 (1971), *aff'd on other grounds*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). Second, while we perceive the denial of a license renewal to be an extreme remedy which should not be lightly assessed, in light of the severity of this sanction, we believe that its mere potential has an inhibiting effect.

[76] *See* ¶52, *infra.*

[77] *See, e.g.*, Public Notice, "Controversial Issue Programming, Fairness Doctrine," FCC 63-734 (July 26, 1963), 25 RR 1899 (1963). *See generally Syracuse Peace Council*, FCC 84-518 (released December 20, 1984), 57 RR 2d 519 (1984).

imposes costs upon the licensee. In order to avoid these costs, a broadcaster may be inhibited from presenting more than a minimal amount of controversial issue programming.

33. The potential of a "chilling effect," however, is not restricted to the fear by a broadcaster that the Commission will find a violation of the fairness doctrine and impose sanctions on the licensee. A licensee may also be inhibited from presenting controversial issue programming by the fear of incurring the various expenses and other burdens which may arise in the context of fairness doctrine litigation regardless of whether or not it is ultimately found to be in violation of the doctrine.

34. As one broadcaster noted, licensees are "conscious of the probability that coverage of a highly controversial issue will trigger an avalanche of protests"[78] demanding air time for the presentation of opposing viewpoints. While most requests may be made in good faith, there is evidence that some complainants invoke a licensee's fairness doctrine obligations in an attempt either to pressure a broadcaster to censor specific programming[79] to harass licensees into presenting a particular spokesman or broadcast.[80] Whether or not the requests are legitimate, a station

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[78] "Comments of Tribune Broadcasting Co." at 9 [hereinafter cited as "Tribune Comments"].

[79] For example, PMC, a fairness doctrine supporter, describes a situation in which a coalition of organizations supporting legalized abortion invoked the fairness doctrine in their efforts to convince a Washington, D.C. television station, WJLA-TV, to cancel an anti-abortion film. PMC Comments, *supra* n.73 at 12. While the group was unsuccessful, in its Comments PMC recounts several situations, which are described *infra* at ¶¶ 48-49, in which complainants did in fact dissuade broadcasters from airing advertisements supporting or opposing ballot propositions. Similarly, as described at ¶ 44, *infra*, the National Association of Broadcasters ("NAB") recounts an instance in which a member of a religious cult, threatening to file a fairness doctrine complaint, successfully demanded the station to cancel a series on the religious organization. "Comments of the National Association of Broadcasters", App. Vol., App. D at 2 (Example No. 1) [hereinafter cited as "NAB Comments"].

[80] PMC describes the following situation in which an anti-nuclear group used the fairness doctrine to have its ballot propositions aired:

> Schwartzman [a Washington D.C. communications attorney] applied muscle in Washington.
>
> Inside forty-eight hours, every radio station had been contacted to find out which were running the industry ads .... [A] few refused to negotiate, claiming their news and public affairs coverage gave adequate balance.
>
> With Schwartzman's aid, a preliminary complaint was filed against the largest station by telegram on Thursday night.
>
> MNRC [the anti-nuclear group] also called the Chief of the FCC's fairness/political broadcast branch at home. On Friday morning, MNRC and the station's attorneys negotiated a settlement and the complaint was

nonetheless may incur additional personnel costs in negotiating with the group seeking responsive programming.

35. Broadcasters can also be deterred by the financial costs involved in defending a fairness doctrine complaint. The record reflects that such costs can be substantial. For example, a fairness doctrine complaint was brought against KREM-TV, a television station in Spokane, Washington charging the station with unbalanced coverage of a bond issue for an international exposition entitled "Expo-74."[81] While the Commission ultimately made the determination that the licensee did not violate the fairness doctrine, the administrative process extended for more than 20 months.[82] The licensee incurred legal costs of at least $20,000 and other expenses, such as travel expenses, significantly added to that total.[83] As the total profits reported by all three Spokane televisions stations in 1972 were approximately $494,000,[84] the financial burden borne by the station in defending

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withdrawn.

With this precedent, and more pressure from Schwartzman, every station that had carried the industry's ads was airing MNRC ads for free by Friday night.

PMC Comments, *supra* n.73 at 31. It is significant that PMC, in describing this scenario, does not dispute the stations' contention that they already were in compliance with the fairness doctrine by virtue of the fact that their news and public affairs programming provided adequate balance to the industry's advertisements. Rather, the objective of the anti-nuclear group, as expressed by PMC, was to have the stations broadcast their particular advertisements rather than to have the stations comply with the requirements of the fairness doctrine. It is also noteworthy that the complaint—which was withdrawn in less than one day—was filed against the "largest" station; the commenter did not state that the anti-nuclear coalition perceived that this station was in violation of the fairness doctrine. A number of other examples in which complainants invoked the fairness doctrine to demand that a licensee air a specific broadcast or present a specific spokesperson are described elsewhere in this *Report*. *See* ¶¶ 49–50, *infra*.

[81] *Sherwyn M. Heckt,* 40 FCC 2d 1150 (1973).

[82] The complaint was filed on September 8, 1971; the station responded on October 12, 1971 and the complainant replied seventeen days later. The licensee made further responses on December 2, 1971 and May 11, 1972. The Commission initiated a four-day field investigation on June 5, 1972. The Commission made an additional inquiry to the licensee on December 6, 1972 and the licensee responded on February 6, 1973. The Commission's staff issued a ruling vindicating the licensee on May 17, 1973. *Id.*

[83] *See* "Comments of Henry Geller and Donna Lampert," App. B at 2 [hereinafter cited as "Geller/Lampert Comments"]; "Comments of CBS, Inc." at 83 [hereinafter cited as "CBS Comments"]; "Comments of the Freedom of Expression Foundation" at 75 [hereinafter cited as "FEF Comments"]; NAB Comments, *supra* n.79 at 42.

[84] *See* Geller/Lampert Comments, *supra* n.83, App. B at 2; CBS Comments, *supra* n.83 at 84. Indeed, the station manager of KREM-TV testified that the fairness doctrine complaint resulted in a severe personal financial loss. *Freedom of*

this single fairness doctrine complaint was considerable. Moreover, in addition to the legal costs and other out-of-pocket expenses incurred by the station, the licensee was further burdened by the dislocation of normal operational functions that necessarily resulted from the significant amount of time expended by high-level management and station employees with respect to this matter.[85]

36. Another example of the significant financial burdens which can result from fairness doctrine litigation is the NBC award-winning[86] documentary on abuses in the private pension industry entitled "Pensions: the Broken Promise."[87] Determining that the program presented one side of the controversial issue of the "performance and need for regulation of private pension plans,"[88] the Commission found NBC was required to present contrasting viewpoints. While NBC was ultimately vindicated,[89] the administrative and judicial proceedings extended for four years and NBC incurred approximately $100,000 in legal costs in defense of the fairness doctrine complaint.[90]

Expression Act of 1983: Hearings Before the Senate Committee on Commerce, Science and Transportation, 98th Cong., 2d Sess. 129, 227 (1984) [hereinafter cited as "*1983 Hearings*"].

[85] The President and Vice-President of KREM-TV devoted 80 hours to the fairness doctrine complaint. In addition, the station manager and six members of the news staff spent 207 hours and 194 hours, respectively, on this matter. *See* Geller/Lambert Comments, *supra* n.83, App. B at 2-3; NAB Comments, *supra* n.79 at 42 and App. Vol., App. D at 19 (Example No. 17); CBS Comments *supra* n.83 at 84, n.**. Addditional time was incurred by secretarial or clerical employees.

[86] NBC received a Christopher Award, a National Headliner Award, an American Bar Association Award and the George Foster Peabody Award for its investigative documentary. "Comments of the National Broadcasting Co., Inc." at 16 [hereinafter cited as "NBC Comments"].

[87] *See, e.g., Notice, supra* n.1 at ¶¶ 73-75; NBC Comments, *supra* n.86 at 14-36; NAB Comments, *supra* n.79, App. Vol., App. D at 18 (Example No. 16).

[88] *Accuracy in Media, Inc. Against National Broadcasting Co.,* 44 FCC 2d 1027, 1043 (1973), *rev'd sub nom. National Broadcasting Co. v. FCC,* 516 F.2d 1101 (D.C. Cir. 1974), *reversal vacated and hearing en banc granted,* 516 F.2d 1155 (D.C. Cir.), *rehearing en banc vacated,* 516 F. 2d 1156 (D.C. Cir. 1975), *second reversal vacated as moot and remanded with direction to vacate initial order and dismiss complaint,* 516 F.2d 1180 (D.C. Cir.), *cert. denied,* 424 U.S. 910 (1976). The Commission subsequently vacated its order and dismissed the case as moot. *Accuracy in Media, Inc. Against National Broadcasting Co.,* 58 FCC 2d 361 (1976).

[89] The United States Court of Appeals reversed the Commission's *Order* but that decision was in turn vacated because the passage of legislation on private pension plans had rendered the decision moot. *See* n.88, *supra.*

[90] A further example involves the series of editorials critical of the Mayor of Milwaukee, other government officials and the city management aired by WTMJ. The Mayor, Henry Maier, filed a complaint with the Commission on June 5, 1981, arguing, *inter alia,* that the station had violated the fairness

37. Certain parties take issue with the contention that the fear of fairness doctrine litigation can have an inhibiting effect on the presentation of controversial issues of public importance.[91] In support of their position, these parties argue that the Commission requests broadcasters to respond to only a small number of the complaints it receives annually and, as a consequence, most broadcasters do not in fact incur such costs. The evidence of record in this proceeding, however, reflects that broadcasters are convinced that these costs can in fact be a significant inhibiting factor in the presentation of controversial issues.[92] Moreover, while it may be true that most broadcasters may not be confronted with actual fairness doctrine litigation, virtually all broadcasters do incur administrative and financial costs which result from presenting responsive programming and negotiating with complainants. Furthermore, in light of the fact that the costs involved in fairness doctrine cases which do proceed beyond the complaint stage can be prohibitively expensive, particularly to smaller stations, we believe that there is a substantial danger that many broadcasters are inhibited from providing controversial issues of public importance by operation of the fairness doctrine.

38. We also reject the contention that we should be unconcerned with the administrative and financial burdens that result from the fairness doctrine because they merely represent the cost of doing business. Indeed, the United States Supreme Court has recognized that financial considerations "may be markedly more inhibiting than the fear of prosecution under a criminal statute."[93]

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doctrine. This complaint was denied by the Broadcast Bureau application for review of this *Order* filed by the complainant was denied by the Commission and the United States Court of Appeals affirmed the Commission's *Order*. *Maier v. FCC*, 735 F.2d 220 (7th Cir. 1984). The administrative and judicial proceedings, however, extended for a period of three years. During the pendency of the appellate case, the Manager of Public Affairs of WTMJ, Mr. Ed Hinshaw, testified that defense of the fairness doctrine complaint had already caused the station to incur legal expenses in excess of $17,000. He also estimated that the management and staff time expended on the complaint to be more than two person months. *1983 Hearings, supra* n.84 at 146; NAB Comments, *supra* n.79, App. Vol. App. D at 21 (Example No. 18).

[91] "Reply Comments of Black Citizens for a Fair Media, Citizens Communications Center, League of United Latin American Citizens, National Association for the Advancement of Colored People, and National Association for Better Broadcasting" at 59 [hereinafter cited as "BCFM Reply Comments"]. For the reasons described above, we also reject the assertion of BCFM that the expenses incurred in responding to fairness doctrine complaints are not substantial. *Id.* at 59–60.

[92] *See e.g.*, NAB Comments, *supra* n.79, App. Vol., App. D at 5, 7, 21–22, 25–26 (Example Nos. 4, 6, 18, 20).

[93] *New York Times Co. v. Sullivan*, 376 U.S. at 277.

To the extent that the fear of incuring financial expenses discourages the presentation of controversial issues of public importance, important constitutional principles are thwarted; indeed such inhibition directly and adversely impacts upon "the principle [underlying the First Amendment] that debate on public issues should be uninhibited, robust and wide-open . . . ."[94]

39. In addition to the fear of incurring the administrative and financial costs attributable to fairness doctrine obligations, the mere accusation by a federal agency or even a complainant that a broadcast station has not abided by its responsibility to provide balanced coverage of controversial issues can have an inhibiting effect. A station is dependent upon the good will of its viewing or listening audience as a consequence, a station has a positive incentive to avoid a charge which may have the effect of lowering its reputation in the community. Broadcasters are acutely aware of the harm which may result from even a frivolous charge that the station violated the fairness doctrine. For example, WINZ, a radio station in Miami, Florida, initiated a petition drive in conjunction with the Dade County Consumer Affair's Office that was designed to persuade the Florida Public Service Commission to reduce or reject a rate increase proposed by Florida Power and Light Company. Despite the fact that the radio station was ultimately vindicated of any wrongdoing by the Commission, the general manager of the station testified that:

> I feel that Florida Power & Light used the fairness doctrine to provide themselves with a way to create adverse publicity for WINZ. The simple fact that they accused us of violating this rule created the impression we were wrong in undertaking the issue, even if that wasn't the case. Often the accused party suffers, whether right or wrong, only because they have been accused.[95]

40. Similarly, Mr. Bos Johnson, News Director of WSAZ-TV in Huntington, West Virginia, recounted a situation in which his station was subject to a fairness doctrine complaint during negotiations for the transfer of that station. He stated that:

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[94] *Id.* at 270.

[95] *1983 Hearings, supra* n.84 at 29 (testimony of Stan Cohen). *See also* FEF Comments, *supra* n.83 at 73-74; NAB Comments, *supra* n.79, App. Vol., App. D at 27-28 (Example No. 21). In addition to the damage to the reputation of the station, the stigma arising from an accusation that the station violated the fairness doctrine can have an adverse effect upon the station's employees. For example, Mr. Eugene Wilkin, the former general manager of KREM-TV in Spokane, Washington testified that the financial and emotional strain arising from an accusation that he violated the fairness doctrine was the main reason that he left broadcasting management, despite a career in that field spanning more than a decade. *See e.g.,* FEF Comments, *supra* n.83 at 75-76; NAB Comments, *supra* n.70, App. Vol., App. D at 32-33 (Example No. 24).

> It was a serious embarrassment to me professionally to feel responsible for the cost and effort of a Fairness Doctrine complaint in the midst of delicate business negotiations. And for the duration of those negotiations, while sitting at my desk working as a journalist, I was always aware of the large file containing information relating to the complaint.[96]

41. In sum, with the potential of government sanction; administrative, legal, and personnel expenses; and reputational costs, there is a significant danger that broadcasters will minimize their presentation of controversial issue programming in order to avoid the substantial dangers associated with the fairness doctrine. In the following section we shall evaluate the record evidence in order to ascertain whether or not broadcasters are in fact deterred from presenting controversial issue programming by operation of the fairness doctrine.

2. The Record Demonstrates that The Fairness Doctrine Causes Broadcasters to Restrict Their Coverage of Controversial Issues.

42. The record reflects that, in operation, the fairness doctrine — in stark contravention of its purpose — operates as a pervasive[97] and significant impediment to the broadcasting of controversial issues of public importance.[98] In spite of the difficulty generally encountered in establishing a "chilling effect,"[99] we find

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[96] NAB Comments, *supra* n.83, App. Vol., App. D at 34 (Example No. 25).

[97] The record reflects that the chilling effect resulting from fairness doctrine obligation is widespread. A recent survey of broadcasters in the Houston area revealed that the majority of responding parties with opinions stated that they were personally aware of instances in which programming has been suppressed as a direct result of the inhibiting effect of the fairness doctrine. "Comments of the Society of Professional Journalists, Sigma Delta Chi and the Legal Foundation of America" at 5-6 [hereinafter cited as "Society of Professional Journalists' Comments"].

[98] In our *1974 Fairness Report* we rejected the arguments of some broadcasters that in operation the fairness doctrine inhibited the coverage of controversial issues of importance to the public. In that proceeding, we stated that we have seen "no credible evidence that our policies have in fact had 'the net effect of reducing rather than enhancing the volume and quality of coverage.' *1974 Fairness Report*, 48 FCC 2d at 8, *quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 393. As set forth in this section, however, the substantial and significant evidence presented in this proceeding demonstrates the existence of a pervasive and substantial "chilling effect" on the presentation of controversial issues by broadcasters. As a consequence, we can no longer conclude that the fairness doctrine operates to enhance, in either quantitative or qualitative terms, the amount of controversial issue programming available to the public.

[99] The United States Court of Appeals has stated that:

> Chilling effect is, by its very nature, difficult to establish in concrete and quantitative terms; the absence of any direct actions against individuals assertedly subject to a chill can be viewed as much as proof of the success of the chill as of evidence of the absence of any need for concern. To be sure,

that the evidence of record mandates the conclusion that the requirement that broadcasters provide balance in their overall coverage of controversial public issues in fact makes them more timid than they would otherwise be in airing programming that involves such issues.[100] We recognize that the first prong of the fairness doctrine requires licensees to present controversial issues of public importance to their viewers and listeners; as a consequence, we do not believe that the fear of fairness doctrine obligations typically results in a systematic avoidance of all controversial issues by broadcasters.[101] The record reflects, however, that the intrusion by government into the editorial decisions

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where actual instances of harassment are established, or where past experience with similar regulation yields concerte evidence of a successful chill, the case is a stronger one. . . .

Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1118 (D.C. Cir. 1978).

[100] One example of this "timid" approach is recounted by the station manager of the Cornhusker Television Corporation. With the exception of programming produced by the network, he states that it is standard practice for the station not to accept nationally produced programming which discusses controversial subjects:

> The reason for this [policy] is although the producer says the program is objective in nature, we as licensees must be the sole judge of what is or is not controversial in order to act properly under the Fairness Doctrine. Also, is it true that what a producer in New York or Washington D.C. may consider objective, may not be defined in the same G way in Nebraska because as you know viewpoints vary drastically from one section of the country to another. Therefore, there are probably some good Public Affairs programs which we have decided not to run because the Fairness Doctrine might come into play and we would not be prepared to give reasonable access to opposing viewpoints.

NAB Comments, *supra* n.79, App. Vol., App. D at 38 (Example No. 27) (emphasis omitted). Notwithstanding the station manager's express representation that the avoidance of fairness doctrine obligations was the reason that the station rejected all non-network nationally-produced programming, BCFM nonetheless contends that this policy must be based on some other reason. BCFM argues that "if the station truly wished to avoid controversial subjects, it would review each program independently, "whether or not it was locally or nationally produced. BCFM Reply Comments, *supra* n.91 at 65. BCFM's argument, however, ignores the fact that a station may wish to lessen the amount of controversial public issue programming in order to minimize the burdens associated with providing access to opposing viewpoints without totally eliminating such programming, particularly in light of the fact a total elimination would subject the station to charges that it violated the first prong on the fairness doctrine. Furthermore, as noted above, the station manager affirmatively stated that the reason that station adopted this policy was to minimize the regulatory burdens associated with the fairness doctrine.

[101] At least one broadcaster, however, has candidly admitted that "his news staff avoids controversial issues as a matter of routine because of the Fairness Doctrine." NAB Comments, *supra* n.79, App. Vol., App. D at 5 (Example No. 4).

of broadcast journalists occasioned by fairness doctrine requirements overall lessens the flow of diverse viewpoints to the public to the detriment of the broadcasters and the public alike.

43. Journalists who have worked in both the broadcast and print media have testified that the very existence of the fairness doctrine creates a climate of timidity and fear, unexperienced by print journalists, that is antithetical to journalistic freedom. The inhibitions resulting from the interjection of a ubiquitous and brooding governmental presence into the editorial decisionmaking process is vividly described by Mr. Dan Rather, Managing Editor and Anchor of CBS News, as follows:

> When I was a young reporter, I worked briefly for wire services, small radio stations, and newspapers, and I finally settled into a job at a large radio station owned by the Houston Chronicle. Almost immediately on starting work in that station's newsroom, I became aware of a concern which I had previously barely known existed -- the FCC. The journalists at the Chronicle did not worry about it; those at the radio station did. Not only the station manager but the newspeople as well were very much aware of this Government presence looking over their shoulders. I can recall newsroom conversations about what the FCC implications of broadcasting a particular report would be. Once a newsperson has to stop and consider what a Government agency will think of something he or she wants to put on the air, an invaluable element of freedom has been lost.[102]

44. The record reflects that broadcasters from television network anchors to small radio station journalists perceive the fairness doctrine to operate as a demonstrable deterrent in the coverage of controversial issues. Indeed, the record is replete with descriptions from broadcasters who have candidly recounted specific instances in which they decided not to air controversial matters of public importance because such broadcasts might

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[102] CBS Comments, *supra* n.83 at 72-73. Similar sentiments have been expressed by Mr. Bill Monroe, moderator and executive producer of the popular show "Meet the Press." He has stated that:

> Some years ago as a young man I worked for a newspaper. I was very impressed with the spirit of independence on the part of the editors of the newpaper. They didn't care if something they put in the paper offended a major political figure. Later I went to a television station and slowly I discovered that the managers of the television station were a little afraid of government. They were timid, conscious of government looking over their shoulder in a way that the newspaper publisher and editor for whom I had worked had not been. I began to feel I was a little bit less than free, and it worried me.

FEF Comments, *supra* n.83 at 69, *quoting* American Enterprise Insitute Roundtable, *Freedom of the Press* (July 29 and 30, 1975) published by the American Enterprise Institute for Public Policy Research, Washington D.C. (Statement of Bill Monroe before the National Press Club).

trigger fairness doctrine obligations. For example, fearing the imposition of onerous regulatory burdens, Meredith Corporation states that one of its stations elected not to air a paid program on the nuclear arms race.[103] As a result of this decision, the public was deprived of information on an important public issue. Similarly, Mr. J. T. Whitlock, the President and General Manager of the Lebanon-Springfield Broadcasting Company, testified that the fear of having to defend a fairness doctrine complaint was the reason that his station did not editorialize on an important local issue even though, in his editorial judgment, the situation ". . . cried for editorials by the station."[104]

45. As a further example, after work had begun in the preparation of a series on religious cults, the manager of a Southern California radio station decided that the series would not be broadcast. The decision to cancel this series was not based upon the editorial judgment of the broadcaster but rather upon an assessment of the legal and personnel costs associated with defending a possible fairness doctrine complaint.[105] Similarly, Mr.

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[103] "Meredith Corporation's Comments Regarding Notice of Inquiry" at 3. [hereinafter cited as "Meredith Comments"].

[104] NAB Comments, *supra* n.79, App. Vol., App. D at 29 (Example No. 22). BCFM contends that the decision not to editorialize "appears" to be based upon an incorrect perception that the "equal time" requirements of the political editorial rules are applicable in this situation. BCFM Reply Comments, *supra* n.91 at 69 n.32. *See* 47 C.F.R. §73.1930 (1984). It also asserts that any fairness doctrine obligations incurred by the station in the broadcast of this editorial "would probably have been met by its news coverage." BCFM Reply Comments, *supra* n.91 at 69 n.32. In our view, both arguments are speculative. There is nothing in the example to suggest either that the concern of the broadcaster was based upon the requirements of the political editorial rule or that the station's news coverage would have provided opposing viewpoints sufficient to meet the requirements of the fairness doctrine.

[105] NAB Comments, *supra* n.79, App. Vol., Vol D at 2 (Example No. 1). Two parties contend that this example lends no support for the existence of a "chilling effect," but we believe that their arguments lack merit. Citing *Religion and Ethics Institute, Inc.*, 42 RR 2d 1657 (1978), a Broadcast Bureau decision, MAP/TRAC argue that "[t]he Commission has repeatedly held . . . that discussion of religious doctrine and related issues are matters of private, not public controversy, and do not involve application of the fairness doctrine" ("Reply Comments of Media Access Project and Telecommunications Research and Action Center" at 39 [hereinafter cited as "MAP/TRAC Reply Comments]); as a consequence, MAP/TRAC contend that it was not reasonable for the broadcasters to be concerned about potential fairness doctrine litigation. The assertion that we have held that issues concerning religious doctrine to be *per se* beyond the scope of the fairness doctrine, however, is clearly erroneous. In fact, even *Religion and Ethics Institute* -- the case cited by MAP/TRAC -- noted that some issues concerning religious doctrine "must be considered controversial and of importance to the community at large" (42 RR 2d at 1659), thereby triggering fairness doctrine obligations. Indeed, the Commission has long asserted that "[t]he fairness doctrine extends to all expressions of views

Paul Jenson, the station manager of Cornhusker Television Corporation, asserted that the fear of fairness doctrine obligations precipitated his cancellation of a series of public announcements concerning inflation. Mr. Jenson testified that the only reason that these announcements were not aired was to avoid the presentation of opposing announcements mandated by the requirements of the fairness doctrine.[106] Another example in the record is the cancellation of a series on the B'nai B'rith by a Pennsylvania radio station. The series was not broadcast because the licensee felt that it could not afford the personnel time to respond to the complaints, the broadcast time to provide responsive programming or the potential legal fees resulting from complaints by perceived extremist groups.[107] In addition, a major Houston

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on controversial issues of public importance, whether or not they [would] be deemed religious views by some persons." *Brandywine Main-Line Radio, Inc.*, 27 FCC 2d 565, 570 (1971), *aff'd*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). Indeed, in *Brandywine*, we refused to renew the station's license on the basis, *inter alia*, that it had violated the fairness doctrine with respect to its religious programming. Therefore, the argument of MAP/TRAC that it was patently unreasonable in this situation for the broadcaster to be concerned about potential fairness doctrine litigation is without merit.

BCFM argues that the broadcaster's fear of incurring the legal and administrative costs in defending a fairness doctrine complaint is irrational; Therefore it contends that the broadcaster was not reasonably inhibited by fairness doctrine obligations and, consequently, this example is not probative of a "chilling effect." BCFM Reply Comments, *supra* n.91 at 67. We have addressed the manner in which legal and administrative costs can result in a "chilling effect," *supra* at ¶¶ 35-36. We believe, therefore, that BCFM's assertion also is without merit.

[106] NAB Comments, *supra* n.79, App. Vol., App. D at 38-39 (Example No. 27). In an attempt to discredit this example, BCFM contends that the station manager was not reasonably inhibited by fairness doctrine obligations; it argues that no equal access for opposing views was required and contends that the station's obligation to provide reasonable access for opposing views "probably" would have been met by its news coverage. BCFM Reply Comments, *supra* n.91 at 69. BCFM provides no support for its asssertion concerning the adequacy of the station's news coverage in meeting the station's fairness doctrine obligations on this issue. In any event, we have no basis for disregarding the station manager's explanation for the reason for the cancellation of the series.

[107] NAB Comments, *supra* n.79, App. Vol, App. D at 62 (Example No. 42). While acknowledging that this example "implies" that the broadcaster's cancellation was induced by the fairness doctrine, BCFM contends that the broadcaster's actual concern was to avoid harassment by extremist groups and that this concern would exist without regard to fairness doctrine obligations. BCFM Reply Comments, *supra* n.91 at 62-63 n.30. We disagree. While a station may have to incur personnel costs in order to respond generally to complaints by the public in the absence of the fairness doctrine, the number of complaints — and consequently the amount of personnel costs — are necessarily increased when a station is obligated to comply with the fairness doctrine; moreover, the costs resulting from a requirement to provide additional "balanced" programming and the costs incurred in defending broadcast decisions clearly are

television station invited a former city official to address the issue of pay raises for police officers but, during the course of the interview, the former official also expressed his views on the issues of pay increases for firefighters and other municipal workers. Fearing to trigger additional fairness doctrine obligations, the station refused to air his views on these additional topics.[108]

46. Equally or perhaps even more disturbing than the self-censorship of individual broadcasts is the fact that the avoidance of fairness doctrine burdens has precipitated specific "policies" on the part of broadcast stations which have the direct effect of diminishing, on a routine basis, the amount of controversial material presented to the public on broadcast stations. For example, the owner of a broadcast station and two newspapers regularly prints editorials in his newspapers but, inhibited by regulatory restrictions, is reluctant to repeat the same editorials on his radio station.[109] Similarly, the Meredith Corporation acknowledges that one of its television stations has chosen "not to editorialize on matters of public importance, because of its concern that it does not have the resources necessary to seek out and provide exposure to opposing viewpoints in all instances."[110] Unfortunately, the policies of these stations are not atypical. In fact, a survey conducted by NAB in 1982 found that only 45 percent of responding stations had presented editorials in the preceding two years.[111] Moreover, the record reflects that even stations which do elect to editorialize are inhibited by fairness doctrine requirements. According to Mr. Donald Gale, News Director of KSL-AM, the regulatory burdens associated with the fairness doctrine were a crucial factor in the decision of his station not to air "guest editorials."[112]

47. Policies of stations that restrict public issue programming are not limited to editorials; they extend to the airing of political

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attributable directly to fairness doctrine obligations.

[108] Society of Professional Journalists' Comments, *supra* n.97 at 7–8.

[109] NAB Comments, *supra* n.79, App. Vol., App. D at 61 (Example No. 41). In its Reply Comments, MAP/TRAC characterize this example as "ignorant and meaningless" but provide no support for this pejorative appellation. MAP/TRAC Reply Copmments, *supra* n.105 at 29.

[110] Meredith Comments *supra* n.103 at 3. *See also* "Comments of Arizona Television Company."

[111] NAB Comments, *supra* n.79 at 38. Moreover, in it Comments NAB describes an informal survey conducted its the Northwest regional conference which found at least 95 percent of the broadcasters, inhibited by regulatory concerns, did not speak out on local issues. *Id.*, App. Vol., App. D at 52 (Statement of Rev. Jim Nicholls) at 52 (Example No. 36).

[112] *Id.*, App. Vol., App. D at 11 (Example No. 11).

advertisements.[113] For example, as a direct result of fairness doctrine obligations, CBS acknowledges that its owned and operated stations, as a general matter, limit the amount of time they will sell both to persons seeking to place advertisements relating to ballot propositions and to political parties attempting to purchase broadcast time outside of campaign periods. CBS states that many of the television stations in four of the five markets in which those stations operate also either refuse or severely limit the sale of time for ballot proposition advertising.[114] Ms. Harriet Kaplan, the Chief Executive Officer of Station WAYS and WROQ-FM in Charlotte, North Carolina states that as a result of the regulatory obligations associated with the fairness doctrine, "I do not even let our sales department pursue political advertising. It is handled by a separate person. . . ."[115] The President and General Manager of WNJR Radio in Union, New Jersey also testified that she is "inclined to steer away from [political advertisements] because of the [regulatory] problems."[116] Similarly, Ms. Karen Maas, Vice President and General Manager of KIUP-AM and KRSJ-FM in Durango, Colorado states that her stations "think twice" about covering state ballot and related political issues.[117]

48. Moreover, the evidence of the "chilling effect" of the fairness doctrine, as applied to political advertisements, is not limited to the statements of broadcasters. For example, in its comments the Glass Packaging Institute ("GPI"), a trade association of the container glass industry which supports the retention of the fairness doctrine,[118] recounts its difficulties in placing advertisements on ballot issues:

> When various coalitions of which GPI was a member have sought to buy broadcast time for the presentation of views on ballot initiatives, many broadcasters have refused to consider their proposals. This refusal generally was occasioned not by normal market forces or broadcaster bias, but by broadcaster's unwillingness to assume the financial cost of providing free response time, as required by *Cullman*. In other instances, the coalitions' requests were met not by a broadcaster refusal to sell time, but, instead, by a rate purposely inflated to cover the anticipated cost of free response time being demanded by the coalitions' opponents on the ballot proposals. The result of these factors was that the coalitions found

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[113] *See, e.g.*, FEF Comments, *supra* n.83 at 64-65.
[114] CBS Comments, *supra* n.83 at 77, n.*.
[115] 1983 Hearings, *supra* n.84 at 224.
[116] *Id.*
[117] NAB Comments, *supra* n.79, App. Vol., App. D at 8 (Example No. 7).
[118] The Glass Packaging Institute, however, has urged the Commission to modify the Cullman Doctrine. "Comments of the Glass Packaging Institute" at 13.

> themselves unable to purchase broadcast time within which to address ballot issues, either because of a broadcast licensee's refusal to sell time, or because the time costs were prohibitive, both obstacles being the result of the broadcasters' fear of resulting *Cullman* obligations.[119]

Similarly, in its comments, the National Rifle Association of America ("NRA"), an organization which has also urged the Commission to retain the fairness doctrine, documented its difficulties in placing advertisements on ballot propositions. Like the GPI, the NRA attributed the reluctance of broadcasters to accept these advertisements on the fact that their acceptance would subject broadcasters to the responsive requirements of the fairness doctrine.[120]

49. The most compelling evidence of the existence of a "chilling effect" with respect to ballot advertising is presented in the Comments of the Public Media Center ("PMC"), an organization which, as noted above,[121] is actively involved in prosecuting complaints under the fairness doctrine. In its Comments, PMC vividly illustrates the manner in which a complainant can successfully pressure broadcasters into refusing to sell advertising on ballot issues. For example, PMC recounts the tactics of a pro-bottle bill coalition as follows:

> Ads opposing the beverage deposit — sponsored by an industry front group . . . hit the air in early August. Within ten days, [the pro-bottle bill coalition] sent a letter to all 500 California stations asking for a 2 to 1

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[119] *Id.* at 11-12. In *Cullman Broadcasting Co.*, 40 FCC 576 (1963), we stated that:

> where the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented (or does not plan to present) contrasting viewpoints in other programming, and has been unable to obtain paid sponsorship for the appropriate presentation of the opposing viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee — and *thus leave the public uninformed* — on the ground that he cannot obtain paid sponsorship for that presentation.

Id. at 577 (emphasis in original).

[120] In its Comments, the NRA stated that:

> In attempting to address controversial issues, including ballot propositions affecting the Second Amendment, *ad hoc* organizations formed by local firearms owners and other citizens often have been faced with a broadcast licensee who has elected to exercise its right to refuse all advocacy advertising. Invariably, this refusal is based . . . on an unwillingness of the broadcast licensee to risk the imposition of the financial penalty inherent in the *Cullman* obligation to invade its limited stock of commercial time in order to provide free response time to opponents on the issue.

"Comments of the National Rifle Association of America" at 32-33.

[121] *See* n.73, *supra*.

> ratio in free spot time. *[The coalition] urged broadcasters to refuse to sell time and therefore avoid a fairness situation at all.*[122]

The majority of the California stations followed the coalition's exortation. Less than one-third of the stations contacted by the coalition sold ballot advertising to the industry group.[123]

50. Similarly, PMC describes the successful invocation of the fairness doctrine by anti-smoking group in order to pressure broadcasters into refusing to sell advertising time to their opponents. PMC recounts that the anti-smoking group:

> . . . mailed "pre-emptive" letters to every local broadcast station, remarking on the upcoming vote and asking to be notified as soon as the tobacco industry bought airtime . . . . *[T]en Miami stations, seeking to avoid [the group's] predictable demands, simply refused to sell time to the industry front.*[124]

As a consequence, the public was denied information on a matter of important local concern.

51. In addition to political advertisements, the record reflects that the onerous requirements associated with the fairness doctrine have resulted in the widespread practice of many broadcasters to refuse to air any public issue advertisements. For example, one broadcaster employed by a large television station states that his station and six others under common ownership have a "company policy" not to accept issue advertising.[125] A number of trade associations have also documented that broadcast licensees, inhibited by the requirements of the fairness doctrine, have refused to air issue-oriented advertisements. The comments of the American Association of Advertising Agencies are illustrative:

> Many large corporations, consistent with a special expertise or interest in a specific public policy or issue, occasionally approach the broadcast media seeking to purchase air time for dissemination of public interest advertisements . . . . [B]roadcast licensees have regularly rejected offers for such advertisements — *not* because of some defect in the ads themselves, but rather because the Fairness Doctrine requires broadcasters

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[122] PMC Comments, *supra* n.73 at 28 (emphasis added).

[123] *See id.*

[124] *Id.* at 16-17 (emphasis added).

[125] NAB Comments, *supra* n.79, App. Vol., App. D at 11 (Example No. 10). Similarly, as noted by the United States Court of Appeals in *Maier v. FCC*, 735 F.2d 220, 234 n.19 (7th Cir. 1984), WTMJ-TV, a broadcast station in Milwaukee, Wisconsin has a "station policy that '[t]ime is not sold for the discussion of controversial issues.' "

> carrying paid public interest advertisements to carry opposing viewpoints as well — even if no one steps forward to pay for them.[126]

Similarly, the Association of National Advertisers, a trade association composed of companies which employ advertising in the marketing of goods and services to the public, documents that its members wish to present their views on issues of public controversy but are often "frustrated by rejections at the hands of broadcast licensees who claim that to accept such paid communications will subject them to onerous balancing obligations because of the Fairness Doctrine . . . ."[127]

52. The inhibiting effect of the fairness doctrine on the presentation of issue-oriented advertising is vividly illustrated in the comments of Mobil Corporation, another party who actively supports the retention of the fairness doctrine. Relying on its "considerable experience" in this area, Mobil recounts that it has been thwarted in its efforts to provide the public with its side of public issue as a result of "the broadcasters' outright refusal to permit the presentation of conflicting views on particular issues of public importance."[128] In stark contrast to this experience, Mobil states that the "print media has been willing to sell space for Mobil to present its views, and has never disagreed with the substance or placement of materials . . . ."[129] While Mobil itself does not attribute its difference in treatment to the regulatory burdens associated with complying with the requirements of the fairness doctrine, evidence in the record, which we find persuasive, indicates that the refusal of many broadcasters to air Mobil's advertisements was in fact based upon a concern that the commercial would trigger requests for the broadcast of responsive viewpoints under the fairness doctrine.[130]

53. Further evidence of the demonstrable inhibiting effect of the fairness doctrine is documented by our own administrative decisions. Except in extremely rare situations, a licensee is not challenged under the fairness doctrine for a failure to air a specific

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[126] "Comments of the American Association of Advertising Agencies in Furtherance of the Commission's Inquiry to Support Repeal of the Fairness Doctrine" at 3-4 (emphasis in original). *See also* "Comments of the American Advertising Federation"; "Comments of the Association of National Advertisers Inc." [hereinafter cited as "ANA Comments"]. *See also* NAB Comments, *supra* n.79, App. Vol., App. D at 30-31 (Example Nos. 23).

[127] ANA Comments, *supra* n.126 at 2.

[128] "Comments of Mobil Corporation," at 3-4 [hereinafter cited as "Mobil Corp. Comments"].

[129] *Id.* at 4.

[130] NAB Comments, *supra* n.79, App. Vol., App. D at 60 (Example No. 40).

controversial issue of importance to the community;[131] rather, the typical fairness doctrine case addresses whether the licensee provided overall balanced coverage with respect to those issues which, in its discretion, it chose to present. As a consequence, in those instances in which we determined that the licensee failed to broadcast a sufficient amount of responsive programming which is mandated under the second prong of the fairness doctrine, we have imposed sanctions — including the ultimate penalty of non-renewal — upon broadcasters who have actually provided large amounts of controversial issue programming. With respect to these broadcasters, the anomalous result of enforcing the second prong of the fairness doctrine is to inhibit or silence licensees who make significant contributions to the marketplace of ideas.[132]

54. *Brandywine-Main Line Radio Inc.*,[133] a case involving the license renewal of WXUR, is a vivid illustration of the way in which application of the fairness doctrine has operated to stifle controversial issue programming. The uncontroverted evidence of that case demonstrated that "controversial issue programming was a substantial part of WXUR's total programming"[134] during

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[131] *See, e.g., Brent Buell*, 97 FCC 2d 55, 57 (1984). As we stated in our *1974 Fairness Report*, "the usual fairness complaint does not involve an allegation that the licensee has not devoted sufficient time to the discussion of public issues." *1974 Fairness Report*, 48 FCC 2d at 10. Indeed, on only one occasion have we determined that the licensee acted unreasonably in failing to cover a specific controversial issue of paramount importance to the community. *Representative Patsy Mink*, 59 FCC 2d 987 (1976).

[132] In making this assertion, we do not — and cannot — pass judgment on the wisdom or propriety of the viewpoints expressed. Indeed, the Commission may conclude that a licensee makes a significant contribution to the marketplace of ideas, even though the Commission—or a majority of the public — may disagree or even abhor the opinions expressed by the licensee. As the United States Supreme Court has stated, "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *FCC v. Pacifica Foundation*, 438 U.S. 726, 745-46 (1978). The presentation of diverse viewpoints on controversial issues of public importance enables members of the public, rather than any governmental entity, to accept or reject the different attitudes and viewpoints; the exposure to the marketplace of ideas, therefore, provides the public with the means to understand the vital issues of the day.

[133] *Brandywine-Main Line Radio Inc., supra* n.75.

[134] *Id.*, 24 FCC 2d at 22. Indeed, the Initial Decision noted that:

> In the broad perspective of this record, it is almost inconceivable that any station could have broadcast more variegated opinions upon so many issues than WXUR .... The multitudinous seas of opinion were navigated in what seemed to be a breathtaking course and this, indeed, was a main cause of the station's difficulties—not that it was narrowly partisan but that it sought and received too much controversy.
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> * * * *
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> There is a strange irony in the fact that WXUR has attempted to do

its term of license. The Commission also found that the station did provide some coverage of opposing viewpoints, but the Commission determined that the station did not satisfy the requirement of overall balance in its public issue programming, as "those holding viewpoints contrary to those of the moderator were forced to give their views in an antagonistic setting."[135] As a consequence, the Commission refused to renew the license of WXUR.

55. The Commission's decision in that case had the direct result of reducing the amount of controversial issue programming available to the public. Chief Judge David Bazelon, in dissent to the Court of Appeals' affirmance, stated that WXUR was:

> a radio station devoted to speaking out and stirring debate on controversial issues. The station . . . propogate[d] a viewpoint which was not being heard in the greater Philadelphia area. The record is clear that through its interview and call-in shows it did offer a variety of opinions on a broad range of public issues, and that it never refused to lend its broadcast facilities to spokesman of conflicting viewpoints . . . .
>
> The Commission's . . . decision, has removed WXUR from the air. This has deprived the listening public not only of a viewpoint but also of robust debate on innumerable controversial issues. It is beyond dispute that the public has lost access to information and ideas. This is not a loss to be taken lightly, however unpopular or disruptive we might judge these ideas to be.[136]

56. A number of parties characterize the statements made by broadcasters that document the existence of "chilling effect" as mere "self-serving" utterances to which the Commission should accord little probative value.[137] Because these broadcasters at most merely recount their "personal beliefs about the effect of the Doctrine on programming practices,"[138] these parties argue that their statements do not substantiate the proposition that the overall effect of the fairness doctrine is to inhibit the presentation

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what broadcasters have been exorted to do and that is to offer vigorous discussion of controversial issues. *The station has, in fact, presented such discussion in about the same degree that most stations offer entertainment.*

Brandywine-Main Line Radio, Inc., 24 FCC 2d 42, 130-131 (1970), *rev'd*, 24 FCC 2d 18 (1970), *recon. denied*, 27 FCC 2d 565 (1971), *aff'd*, 473 F.2d 16 (D. C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). (Initial Decision of Hearing Examiner H. Gifford Irion) (emphasis added).

[135] *Brandywine-Main Line Radio, Inc.*, 24 FCC 2d at 23.

[136] *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 70 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973) (Bazelon, C. J. dissenting) (emphasis omitted).

[137] *See, e.g.*, "Reply Comments of the American Civil Liberties Union" at 9 [hereinafter cited as "ACLU Reply Comments"]; MAP/TRAC Reply Comments, *supra* n.105 at 36.

[138] *See* ACLU Reply Comments, *supra* n.137 at 10.

of controversial issues of public importance.

57. We disagree. Because the existence of a "chilling effect" is a subjective perception, the statements of broadcasters who are personally subject to its requirements on a daily basis are able to present some of the best evidence on whether or not the doctrine, in operation, inhibits the presentation of controversial issues of public importance. We also believe that this evidence is more probative than the statements of persons who, by necessity, have to second-guess the broadcaster's state of mind.

58. In addition, we reject the proposition that the evidentiary value of these statements is undercut by their alleged "self-serving" nature. A statement by a broadcaster that he or she is inhibited from presenting controversial issues of public importance is, in a very real sense, an admission against interest. Such a statement may constitute an acknowledgement that the broadcaster may not be abiding by the highest standards of professional journalism, thereby potentially diminishing his or her standing in the profession. In addition, it could create potential regulatory problems for the broadcaster.[139] Further, while it is true that these statements evidencing a "chiling effect" are "self-serving" in the sense that the broadcasters who made them have a direct interest in the outcome of this proceeding, the identical charge could be leveled against every statement of every commenting party. We have never held that the evidence of interested parties lack probity; indeed, were we to adopt such a rule it would be virtually impossible for us to come to any conclusions about any issue raised in this proceeding.

59. Some parties to this proceeding attempt to support the absence of a "chilling effect" by asserting that most broadcasters either support the doctrine or at a minimum deny that it inhibits their speech.[140] We find this argument to be unpersuasive. Virtually all broadcasters or their trade associations which commented on this issue took the position that the fairness doctrine operates as a significant deterrent to the presentation of controversial issues of public importance.[141] There was only one

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[139] The United States Supreme Court has stated that "if present licensees should suddenly prove timorous [in presenting controversial issues of public importance], the Commission is not powerless [to redress the situation]." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 391. In light of this judicial warning, a licensee may believe it imprudent to acknowledge that it has in fact been timorous, thereby inviting potential regulatory litigation.

[140] *See, e.g.*, BCFM Reply Comments, *supra* n.91 at 50-54; PMC Comments, *supra* n.73 at 7-9.

[141] *See, e.g. "Comments [of National Radio Broadcasters Association] on Reassessment of the Fairness Doctrine," at 8; NAB Comments, supra* n.79, App. Vol.,

broadcaster on the record of this proceeding which voiced its support for the fairness doctrine as a matter of policy.[142] Moreover, the second-hand accounts of support of the doctrine by broadcasters that are contained in the pleadings of some proponents of the doctrine are directly contradicted by the statements of the broadcasters themselves in this proceeding.[143] Furthermore, we do not believe that the isolated representations of some broadcasters to the effect that the doctrine does not have any effect on the type, frequency or duration of the controversial viewpoints they air are probative of an absence of chilling effect within the industry as a whole; the fact that some broadcasters may not be inhibited in the presentation of controversial issues of public importance does not prove that broadcasters in general are similarly uninhibited.

60. Some parties assert that any inhibiting effect of the fairness doctrine is not attributable to the actual requirements of the doctrine itself but rather to the misperception of broadcasters as to their precise obligations under the doctrine. These commenters contend that broadcasters are not inhibited by the fear of incurring fairness doctrine obligations unless regulatory requirements in fact attach to their programming.[144] However, broad-

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App. D; "Joint Comments of Radio-Television News Directors Association" at 60-65; CBS Comments, *supra* n.83 at 70-98; NBC Comments, *supra* n.86 at 9-52; Tribune Comments, *supra* n.78 at 8.

[142] "Comments of Group W [Westinghouse Broadcasting & Cable Co.]" at 6-7 [hereinafter cited as "Group W Comments"].

[143] For example, in its Reply Comments, BCFM contends that it "is not the case" that "a majority of licencees, or at least the major networks, . . . oppose the [fairness] doctrine." BCFM Reply Comments, *supra* n.91 at 50. It states further that "NBC, CBS and ABC do not share NAB's view that the doctrine inhibits their speech." *Id.* at 50-51. Based upon the pleadings submitted by broadcasters in this proceeding, these representations appear erroneous. As noted above, the record reflects that the overwhelming majority of broadcasters participating in this inquiry oppose retention of the fairness doctrine. Moreover, with respect to the networks, NBC and CBS filed lengthy comments in this proceeding urging the Commission to eliminate the doctrine; one reason that these parties took this position was that they perceived the doctrine to have a chilling effect upon the speech of broadcasters. NBC Comments, *supra* n.86 at 8-9; CBS Comments, *supra* n.83 at 70-77. Furthermore, expressing the view that the total repeal of the fairness doctrine is a long term goal, ABC urged the Commission to adopt proposals for "major overhaul of the fairness doctrine" to "further enhance the First Amendment rights of broadcast journalists. "Reply Comments of American Broadcasting Companies, Inc." at 5. Indeed, BCFM actually characterizes ABC's proposals as designed "to exempt broadcasters from every meaningful obligation under the fairness doctrine . . . ." BCFM Reply Comments, *supra* n.91 at 74. It is clear, therefore, that the statements of the networks in the record of this proceeding are directly at odds with BCFM's representation that these parties support the fairness doctrine.

[144] *See, e.g.*, BCFM Reply Comments, *supra* n.91 at 66-69; MAP/TRAC Reply

casters are not lawyers. A broadcaster may be uncertain as to the precise boundaries of our detailed and complex regulatory scheme[145] or may be uncertain as to whether he or she will be able to convince us, in the course of fairness doctrine litigation, that the station's overall programming complies with our regulatory requirements. As a consequence, a broadcaster, in order to avoid even the possibility of litigation, may be deterred from airing material even though the Commission, after hearing all the evidence, would have concluded that the program did not trigger fairness doctrine obligations.[146] Indeed, the uncertainty as to whether or not a broadcast contains information which rises to the level of a controversial issue of public importance may itself have an inhibiting effect.[147] In any event, it is the fact of deterrence — not whether or not the Commission, in making an

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Comments, *supra* n.105 at 38-40.

[145] The regulatory requirements associated with the fairness doctrine are not as clear and unambiguous as the parties making this argument would have us believe. As noted in n.105 *supra*, BCFM argued that it was patently absurd for a broadcaster to decide not to air a series on religious cults on the basis that the series would trigger fairness doctrine obligations because religious matters are clearly beyond the scope of the fairness doctrine. Yet, contrary to BCFM's assertions, we have affirmatively stated that matters of religious doctrine, in appropriate circumstances, could precipitate fairness doctrine obligations. *See* n.105, *supra*; *Brandywine Main-Line Radio, Inc.*, 27 FCC 2d at 570.

[146] As the United State Supreme Court has stated:

> The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone .... This is especially to be feared when the complexity of the proofs and the generality of the standards applied provide but shifting sands on which the litigant must maintain his position.

Speiser v. Randall, 357 U.S. 513, 526 (1958) (citation omitted). *See also New York Times Co. v. Sullivan*, 376 U.S. at 279. *See generally Central Intelligence Agency against American Broadcasting Companies, Inc.*, No. 1862 (released Jan. 10, 1985), *application for review denied*, FCC No. 85-374 (adopted July 12, 1985).

[147] We have traditionally recognized that:

> One of the most difficult problems involved in the administration of the fairness doctrine is the determination of the *specific* issue or issues raised by a particular program. Those would seem to be a simple task, but in many cases it is not.

1974 Fairness Report, 48 FCC 2d at 12 (emphasis in original). As Chief Judge J. Skelly Wright of the United States Court of Appeals stated, "issue ambiguity in the fairness doctrine context is a certainty to lessen the free flow of information favored by the First Amendment, and is therefore unacceptable." *American Security Council Education Foundation v. FCC*, 607 F.2d at 458 (J. Skelly Wright, C. J. concurring). In enforcing the fairness doctrine, we are required, *inter alia*, to determine whether or not issues are "publicly important," "controversial," *etc.* Because our experience indicates that identifying and characterizing issues is inherently subjective, issue ambiguity under the fairness doctrine scheme appears unavoidable.

adjudicatory determination on the substantive law would in fact find a fairness doctrine obligation — which is relevant in ascertaining the existence of a chilling effect. As the United States Court of Appeals stated:

> In seeking to identify the chilling effect .... our ultimate concern is not so much with what government officials will actually do, but with how reasonable broadcasters will perceive regulation, and with the likelihood they will censor themselves to avoid official pressure and regulation.[148]

61. A number of commenters argue that there is no inhibiting effect because the Commission has been careful to administer the fairness doctrine in a manner which attenuates the regulatory burdens on broadcasters.[149] It is true that we have enforced the doctrine with a view toward minimizing editorial intrusion on broadcast journalists.[150] But the record in this proceeding has convinced us that the fairness doctrine generally operates to inhibit the presentation of controversial issues of public importance on the airwaves. Because the inhibiting effect is an inevitable result of the substantive rule itself, even carefully crafted implementing mechanisms have not been successful in preventing the fairness doctrine from operating to deter broadcasters from airing important and controversial issues. The mere fact that a more intrusive implementing approach might result in even greater restrictions on the editorial discretion of broadcast-

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[148] *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d at 1116.

[149] *See, e.g.*, Mobil Corp. Comments *supra* n.128 at 25-30; MAP/TRAC Comments *supra* n.50 at 128-133.

[150] *1974 Fairness Report, supra* n.3. Historically we have been concerned over the dangerous potential of the fairness doctrine to chill the speech of broadcasters. Consequently, in enforcing the doctrine we have adopted a number of procedural rules in an attempt to attenuate the intrusion on the editorial freedom of broadcast journalists. *Id.* For example, the Commission, as a condition precedent to filing a fairness doctrine complaint, requires a viewer or listener to first present his or her grievance to the broadcaster. *See, e.g., American Security Council Education Foundation v. FCC*, 607 F.2d at 445. We have also required a person filing a fairness doctrine complaint to establish a *prima facie* case. *See, e.g., Memorandum Opinion and Order on Reconsideration of the Fairness Doctrine Report* in Docket No. 19260 58 FCC 2d 691, 696 (1976), *aff'd sub nom. National Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978). *American Security Council Education Foundation v. FCC* 607 F.2d at 447. In addition, in implementing the doctrine, we have traditionally accorded a significant amount of discretion to broadcasters in the selection of the issues, the manner of coverage, the appropriate spokespersons, and the amount of time devoted to a specific matter. *See 1974 Fairness Report*, 48 FCC 2d at 16. *See also Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 FCC 598 (1964).

ers does not negate the existence of a demonstrable "chilling effect" under the present regulatory scheme.

62. Furthermore, noting that the Commission only forwards a small amount of complaints it receives to broadcasters for justification, several fairness doctrine proponents assert that the Commission fails to enforce its rules and, consequently, broadcasters are not reasonably deterred from airing controversial issues of public importance by operation of the fairness doctrine. We disagree. While it is true that we do not often determine, after review of a fairness doctrine complaint, that it is appropriate for us to request the broadcaster to explain how its programming comports with the fairness doctrine,[151] this fact merely demonstrates that the vast majority of fairness doctrine complaints we receive lack colorable validity. Instead of the improper action ascribed by some commenters, we believe that the paucity of actionable fairness doctrine complaints is probative of the fact that most licensees comply with the fairness doctrine.

63. In addition, several supporters of the retention of the fairness doctrine argue that the record in this proceeding provides inadequate support of a "chilling effect" on the grounds that the NAB, in the appendix to its comments, "merely" provided 45 examples of the way in which the fairness doctrine chills broadcasters' speech. These parties contend that the allegedly small number of examples are "wholly insufficient to suggest that the fairness doctrine has any inherent chilling effect on broadcasters."[152]

64. We find that this contention lacks merit for several reasons. First, the evidentiary support for our conclusion concerning the existence of a "chilling effect" is based, *inter alia*, on the pleadings of numerous parties, including individual broadcasters, corporations, industry groups, trade associations, non-profit corporations as well as the comments of the NAB. Second, even if the evidence of record were limited to the 45 examples contained in the appendix to NAB's comments — which it is not — we do not believe that 45 examples of chill can be discounted on the grounds that they are merely isolated incidents that are unrepresentative of the industry as a whole. This is particularly true in light of the fact that, as noted above, an admission by a broadcaster that the

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[151] *See, e.g., American Security Council Education Foundation v. FCC*, 607 F.2d at 447.

[152] MAP/TRAC Reply Comments, *supra* n.105 at 29. *See also* "Reply Comments of the United States Catholic Conference" at 8 [hereinafter cited as "USCC Reply Comments"].

fairness doctrine inhibits the presentation of controversial issues could be construed as involving a potential rule violation which broadcasters may be reluctant to acknowledge, especially in the record of the licensing regulatory agency.[153]

65. In addition, several parties challenge some of NAB's examples on the grounds that they involve application of the personal attack or political editorializing rule.[154] Noting that these specific applications of the fairness doctrine are the subject of a separate rulemaking,[155] they assert that these examples lack evidentiary value as to the "chilling effect" of the general fairness doctrine. To the contrary, we believe that examples of a "chilling effect" which involve application of the personal attack and political editorializing components of the fairness doctrine contained in the comments of NAB and other parties are probative of the general proposition that intrusive content-based regulation like the fairness doctrine and its ancilliary doctrines inhibit the presentation of controversial issues of public importance on broadcast frequencies.[156] In any event, while these examples do provide evidentiary support regarding the inhibiting effect of the

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[153] Contending that some of the examples cited by NAB are overly vague, anonymous, or otherwise fail to demonstrate that the fairness doctrine in actuality inhibits the presentation of controversial issues of public importance, certain parties argue that the Commission should accord little, if any, probative value to these examples. Contrary to this assertion, we believe that many of the examples contained in NAB's Comments provide substantial and convincing proof of the existence of a "chilling effect" and that the examples set forth by NAB are not so vague as to lack probative value. While some of the sources are unnamed, we note that the examples set forth by anonymous sources are similar to those which are attributed to specific broadcasters. Moreover, as noted above at ¶ 58 *supra*, there are legitimate reasons, unrelated to the probity of the representations, why some broadcasters may desire anonymity with respect to their statements that they were inhibited, by the fear of incurring fairness doctrine obligations, in their presentation of controversial issues of public importance. Furthermore, as noted in ¶ 64 *supra*, our concern is with the evidence contained in the record as a whole rather than with whether each example described by NAB contains specific evidentiary documentation of a "chilling effect."

[154] *See, e.g.*, MAP/TRAC Reply Comments, *supra* n.105 at 30; BCFM Reply Comments, *supra* n.91 at 68-69; ACLU Reply Comments, *supra* n.137 at 10.

[155] *Notice of Proposed Rule Making* in Gen. Docket No. 83-484, FCC 83-218 (released June 14, 1983).

[156] *See, e.g.*, NAB Comments, *supra* n.79, App. Vol., App. D at 35-37, 40-41, 46 and 62 (Example Nos. 26, 28, 31, and 42). *See also* "Comments of KIPR/95 FM"; "Comments of KGRL 940-AM Radio"; CBS Comments, *supra* n.83 at 77-78, n.*; FEF Comments, *supra* n.83 at 71-72, *citing Freedom of Expression Act of 1983: Hearings Before the Senate Committee on Commerce, Science & Transportation*, 98th Cong. 2d Sess. 125-126 (1984).

doctrine, our conclusion as to the existence of a "chilling effect" is in no way dependent upon these examples.[157]

66. Finally, in its Reply Comments, the Media Access Project and the Telecommunications Research and Action Center ("MAP/TRAC") contend that many of the examples of "chilling effect" contained in the NAB's Comments are merely "recycled material" which is of little evidentiary value. In support of this contention, MAP/TRAC recount that a number of these examples have been the subject of published books and articles, Commission proceedings or congressional testimony. With respect to the examples derived from the congressional hearings, MAP/TRAC assert that Congress, by rejecting or failing to enact legislation, found these examples to be unpersuasive.

67. We disagree. In our own view, the probity of these examples is not diminished merely because they have been published, formed the factual basis of an administrative proceeding or presented to Congress. To the extent that any evidentiary relevance attaches to the fact that the contents of a pleading has formed the subject matter of testimony presented under oath to the Nation's lawmakers, this fact would appear to enhance rather than lessen its probative value. Furthermore, contrary to MAP/TRAC's suggestions, the mere fact that Congress chose not to enact legislation does not constitute an affirmative determination on the part of the governing legislative body that the examples lack probity.[158]

68. In sum, we find that the evidence, derived from the record as a whole, leads us to conclude that the fairness doctrine chills speech. As a result of this finding alone we no longer believe that the fairness doctrine, as a matter of policy, furthers the public interest and we have substantial doubts that the fairness doctrine comports with the strictures of the First Amendment. Because the fairness doctrine inhibits the presentation of controversial and important issues, in operation, it actually disserves the purpose it was designed to achieve. In our view, an elimination of the doctrine would result in greater discussion of controversial and important public issues on broadcast facilities. While we believe that the existence of a "chilling effect is sufficient to support our policy conclusion, it is not the only basis upon which we make

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[157] In this regard, we note that none of the evidence of record demonstrating the existence of a "chilling effect" that is described in this section involves an application of the personal attack rule or the political editorializing rule.

[158] MAP/TRAC Reply Comments, *supra* n.105 at 27-28.

this determination. In the following sections we shall discuss other detriments attributable to the fairness doctrine.

C. The Administration of the Fairness Doctrine Operates to Inhibit the Expression of Unorthodox Opinions

69. While the fairness doctrine has the laudatory purpose of encouraging the presentation of diverse viewpoints, we fear that in operation it may have the paradoxical effect of actually inhibiting the expression of a wide spectrum of opinion on controversial issues of public importance.[159] In this regard, our concern is that the administration of the fairness doctrine has unintentionally resulted in stifling viewpoints which may be unorthodox, unpopular or unestablished.

70. First, the requirement to present balanced programming under the second prong of the fairness doctrine is in itself a government regulation that inexorably favors orthodox viewpoints.[160] As we stated in our *1974 Fairness Report*, it is only "major"[161] or "significant"[162] opinions which are within the scope of the regulatory obligation to provide contrasting viewpoints. As a consequence, the fairness doctrine makes a regulatory distinction between two different categories of opinions: those which are "significant enough to warrant broadcast coverage [under the fairness doctrine]"[163] and opinions which do not rise to the level

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[159] Governmental policy which has the effect of inhibiting the expression of specific points of view presents grave First Amendment concerns. As the United States Supreme Court has stated:

> the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.

FCC v. Pacifica Foundation, 438 U.S. at 745.

[160] Justice William Brennan has noted that the fairness doctrine may operate to disfavor viewpoints outside the mainstream of public opinion:

> Under the Fairness Doctrine, a broadcaster is required to present only "*representative* community views and voices on controversial issues" of public importance. Thus, by definition, the Fairness Doctrine tends to perpetuate coverage of those "views and voices" that are already established, while failing to provide for exposure to the public to those "views and voices" that are novel, unorthodox or unrepresentative of prevailing opinion.

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 190 (1973), *quoting Democratic National Committee*, 25 FCC 2d 216, 222 (1970) (Brennan, J., dissenting) (emphasis in original).

[161] *1974 Fairness Report*, 48 FCC 2d at 15.

[162] *Id.*

[163] *Id.*

of a major viewpoint of sufficient public importance[164] that triggers responsive programming obligations. While the broadcaster in the first instance is responsible for evaluating the "viewpoints and shades of opinion which are to be presented,"[165] we are obligated to review the reasonableness of the broadcaster's evaluation. As a consequence, the fairness doctrine in operation inextricably involves the Commission in the dangerous task of evaluating the merits of particular viewpoints. This evaluation has serious First Amendment ramifications. As the Supreme Court has stated:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . .[166]

71. Second, as Chief Judge David Bazelon has stated, our own administrative enforcement of the doctrine provides some support for the contention that some "controversial viewpoint[s] [are] being screened out in favor of the dreary blandness of a more acceptable opinion."[167] Broadcasters who have been denied or threatened with a denial of the renewal of their licenses due to fairness doctrine violations have generally not been those which have provided only minimal coverage of controversial and important public issues. Indeed, some licensees that we have not renewed or threatened with non-renewal have presented controversial issue programming far in excess of that aired by the typical licensee.[168] In a number of situations it was the licenses of broadcasters who aired opinions which many in society found to be abhorrent or extreme which were placed in jeopardy due to allegations of fairness doctrine violations.[169] In conclusion, we are

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[164] *Id.*

[165] *Id.*

[166] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

[167] *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d at 78 (Bazelon, C. J. dissenting).

[168] A discussion of our decision not to renew the license of WXUR on the basis, *inter alia*, of failing to comply with the fairness doctrine is described in detail at ¶¶ 54-55, *supra*. As noted below, in the name of the fairness doctrine we silenced WXUR, a station which had provided an enormous amount of controversial issue programming during its term of license. Similarly, in *Capitol Broadcasting Co.*, 2 RR 2d 1104 (1964), the Commission deferred action on the renewal applications of WRAL during a pendency of an inquiry into the station's compliance with the fairness doctrine notwithstanding the fact that the station's editorials, voiced by its Vice-President, Jesse Helms, presented views "on a *great number of controversial issues* of national and regional importance." *Id.* at 1106 (emphasis added).

[169] *See, e.g., Lamar Life Broadcasting Co.*, 38 FCC 1143 (1965), *rev'd sub nom. Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (FCC refusal to grant a full term license to a station which espoused

extremely concerned over the potential of the fairness doctrine, in operation, to interject the government, even unintentionally, into the position of favoring one type of opinion over another.[170] To the extent that the doctrine has this effect it both disserves the interest of the public in an unencumbered marketplace of ideas and contravenes the fundamental purposes of the First Amendment.

D. In Operation the Fairness Doctrine Places the Government into the Intrusive and Constitutionally Disfavored Role of Scrutinizing Program Content

72. Although we have traditionally attempted to minimize our role in evaluating program content in administering the fairness doctrine,[171] the doctrine has the inexorable effect of interjecting the Commission into the editorial decisionmaking process.[172] In evaluating whether or not a broadcaster has met his or her balanced programming obligations under the fairness doctrine,[173]

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racially segregationist viewpoints); *Brandywine-Main Line Radio, Inc., supra* n.75 (FCC refusal to grant a license renewal to an evangelist station; the Hearing Examiner in *Brandywine* stated that the licensee's "style of presentation over the air — sometimes so racy as to make the gorge rise — was not what men of refined tastes would deem expedient. . . . *Brandywine-Main Line Radio, Inc.*, 24 FCC 2d at 130). *See also Trinity Methodist Church, South v. Federal Radio Commission*, 62 F.2d 850, 851 (D.C. Cir.), *cert. denied*, 284 U.S. 685 (1932) (Federal Radio Commission denied license renewal in a situation in which "the station had been used to attack a religious organization . . . [and where] the broadcasts [aired by the licensee] were sensational rather than instructive . . . . ")

[170] In its Comments, the Office of Communication of the United Church of Christ — a party which intervened in opposition of a grant of renewal in the *Lamar Life* case — argues that in the 1960s extreme right wing broadcasters with odious racial and religious views gained an inordinate amount of influence in large sections of the country. Observing that these broadcasters were subject to fairness doctrine challenges, the United Church of Christ states that "[i]f the doctrine was successfully used to moderate abuses of that period, it served its purpose. . . ." "Comments of the Office of Communication of the United Church of Christ, the Unitarian Universalist Association, the Communication Commission of the National Council of the Churches of Christ in the U.S.A., Everett C. Parker and Al Swift" at 51 [hereinafter referred to as "UCC Comments"]. In our view, use of the fairness doctrine to suppress any point of view, however abhorrent, contravenes the purpose of the doctrine and raises serious constitutional implications.

[171] *See, e.g., 1974 Fairness Report* at 8. *See American Security Council Education Foundation v. FCC*, 607 F.2d at 445.

[172] *See Notice, supra* n.1 at ¶ 71.

[173] Both prongs of the fairness doctrine have the potential to interject the government into the decisionmaking process as to the content of programming. The first prong of the fairness doctrine sanctions governmental intrusion by enabling the Commission to prescribe directly the coverage of a specific

we are obligated to determine whether or not the broadcaster made a reasonable determination as to whether or not the programming presented controversial issues of public importance, and if so, we must assess whether or not the broadcaster provided reasonable opportunities for the presentation of contrasting viewpoints. In evaluating the adequacy of the responsive programming, we have had to draw conclusions as to the reasonableness of the selected program formats and spokespersons.

73. Moreover, in making these assessments, we must necessarily take into account the amount of time in which a specific viewpoint was broadcast. Our staff often performs this task by mechanistically weighing the minutes and even the seconds of time devoted to each expression of opinion.[174] In addition, we must assess the frequency of the broadcast and the degree of audience exposure. Further, because the opportunity to present responsive programming may lose its utility if the controversial issue of public importance triggering the obligation subsequently becomes moot, we must also make judgments as to the timeliness of the opportunity for the discussion of contrasting viewpoints. The minute and subjective scrutiny of program content resulting from the enforcement of the fairness doctrine is at odds with First

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controversial issue of public importance whether or not the broadcaster, in the exercise of his or her journalistic judgment, would choose to cover the issue. As noted *supra* at n.59, however, we impose affirmative programming obligations on broadcasters under the first part of the fairness doctrine only in very rare instances. Because it is the second prong of the doctrine that typically involves the government into the editorial decisionmaking process, this section will address the intrusion resulting from the enforcement of that prong of the doctrine.

[174] At the *en banc* hearing, James C. McKinney, Chief of the Mass Media Bureau, described the detailed scrutiny of program content that necessarily results from the enforcement of the fairness doctrine:

> [I]t might be interesting for you to know the process that we go through here at the agency at the lower staff level before the Commissioners get [a case] for final decision. We . . . sit down with tape recordings [and] video tapes of . . . what has been broadcast on a specific station. We compare that to newspapers [and] other public statements that are made in the community. We try to make a decision as to whether the issue is controversial and whether it is of public importance in that community, which may be 2000 miles away. . . . [W]hen it comes down to the final analysis, we take out stop watches and we start counting [the] seconds and minutes that are devoted to one issue compared to [the] seconds and minutes devoted to the other side of that issue. . . . [I]n the final analysis we start giving our judgment as what words mean in the context of what was said on the air. What was the twist that was given that specific statement, or that commercial advertisement? Was it really pro-nuclear power or was it pro some other associated issue?

Hearings on the Fairness Doctrine; Panel IV (Statement of James C. McKinney) (February 8, 1985).

Amendment principles.[175] For example, in *Miami Herald*, the United States Supreme Court expressed concern that a governmentally mandated right of reply statute applicable to newspapers constituted an unwarranted intrusion on the editorial freedoms of journalists

> because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper, and the decisions made as to the limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of free press as they have evolved to this time.[176]

E. The Fairness Doctrine Creates the Opportunity For Intimidation of Broadcasters by Governmental Officials

74. Notwithstanding our recent efforts to reduce unnecessary regulatory burdens on licensees,[177] the broadcast industry is one which is characterized by pervasive regulation. The fact of this pervasive regulatory authority, including the intrusive power over program content occasioned by the fairness doctrine, provides governmental officials with the dangerous opportunity to abuse their opposition of power in an attempt either to stifle opinion with which they disagree or to coerce broadcasters to favor particular viewpoints which further partisan political objectives. In this regard, Chief Judge Bazelton has observed that "the potential to subject the 'fairness' theory to political abuse is

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[175] Justice William O. Douglas has expressed concern over the intrusive nature of the fairness doctrine:

> [T]he prospect of putting government in a position of control over publishers is to me an appalling one, even to the extent of the Fairness Doctrine. The struggle for liberty has been a struggle against Government. . . .
>
> The Court in today's decision by endorsing the Fairness Doctrine sanctions a federal saddle on broadcast licensees that is agreeable to the traditions of nations that never have known freedom of press and that is tolerable in countries that do not have a written constitution containing prohibitions as absolute as those in the First Amendment.

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 162–63 (Douglas J., concurring).

[176] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 258.

[177] *See, e.g., Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076 (1984) [hereinafter cited as "*Television Deregulation*"]; *Report and Order* in MM Docket No. 84-19, FCC 84-156 (released May 9, 1984), 55 RR 2d 1389 (1984), *recon. denied*, FCC 85-225 (released May 8, 1985) (Elimination of Regional Concentration Rule) [hereinafter cited as "*Regional Concentration*"].

inherent in the operation of the doctrine."[178]

75. Political officials have not been loathe to criticize the manner in which broadcasters have aired controversial matters of public concern[179] and at times the criticism has been accompanied by overt pressure to influence the manner in which these issues are covered.[180] For example, a White House official during the Nixon Administration suggested to the President's Chief of Staff that the Administration respond to the alleged "unfair coverage" of the broadcast media by showing "favorites within the media," establishing "an official monitoring system through the FCC" and making "official complaints from the FCC."[181] The attempts to coerce broadcast journalists, moreover, have not been restricted to specific partisan viewpoints or politicians of a particular political party. As described in the *Notice*, a government official in another Administration was reported to state that the:

> massive strategy [of the Administration] was to use the fairness doctrine to challenge and harass the right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited, and decide that it was too expensive to continue.[182]

We believe that the potential for the fairness doctrine to be abused in order to further partisan political purposes[183] has

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[178] *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d at 78 n.62 (Bazelon, C. J., dissenting).

[179] Chief Judge Bazelon has stated that:

> In the past years, networks have come under repeated attacks from government spokesmen who did not like the way television reported a variety of hot public issues. These attacks did not focus on inaccuracies but on the "bias" or lack of "fairness" in the presentation.

Id. at 78.

[180] An internal memorandum of one high level official of the Nixon Administration reveals that the President directed his staff on twenty-one occasions during a single thirty-day period to take "specific action relating to what could be considered unfair news coverage." Memorandum to H. R. Haldeman from Jeb S. Magruder, "The Shot-gun Versus the Rifle" (Oct. 17, 1969), *reprinted in* D. Bazelon, "FCC Regulation of the Telecommunciations Press," 1975 Duke L.J. 213, 247-51 (1975).

[181] *Id.* at 248.

[182] *Notice*, *supra* n.1 at 78.

[183] Even where there has been no explicit threats by governmental officials, a mere perception that such abuse could occur may itself have an inhibiting effect. Broadcasters may be inhibited from airing viewpoints distasteful to those in power to avoid potential retaliation. As Chief Judge David Bazelon has observed:

> the tremendous stakes in the highly concentrated television medium make the networks particularly sensitive to the prevailing political winds at the FCC, in Congress, and in the White House. And the government has fostered network sensitivity to government wishes by making clear that the failure to

dangerous policy ramifications. As Justice William O. Douglas has stated:

> the regime of federal supervision under the Fairness Doctrine is contrary to our constitutional mandate and makes the broadcast licensee an easy victim of political pressures and reduces him to a timid or submissive segment of the press whose measure of the public interest will now be echoes of the dominant political voice that emerges after every election.[184]

76. Several parties contend that we should not be concerned that the fairness doctrine has the potential to be used as a vehicle for governmental officials to improperly affect the viewpoints aired over broadcast frequencies because such governmental officials have other means, such as the license renewal process and Internal Revenue Service audits, by which to improperly attempt to exert control over broadcasters.[185] We disagree. While the commenters are correct in their assertion that governmental abuse may be effectuated by other mechanisms, we do not have plenary power to safeguard against all types of potential governmental abuse. Certainly the mere fact that alternative means of intimidation may be available does not provide justification for use to blithely ignore the fact that the fairness doctrine provides the dangerous potential for governmental abuse. As Chief Judge Bazelon has stated, "[w]ithout the FCC lever to manipulate, we could hope that there would be less chance that the licensees would be forced to kowtow to the wishes of an incumbent politician."[186]

F. The Fairness Doctrine Imposes Unnecessary Economic Costs Upon Broadcasters and the Commission.

77. In addition to the detriments described above, a further consequence of the fairness doctrine is the economic burdens imposed upon broadcasters and the Commission. As described above, the doctrine places significant economic costs upon a licensee. Such costs are incurred, for example, in negotiating with the public regarding responsive programming obligations, in

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respond to the government's concept of appropriate program content would jeopardize the all-valuable license. I am reminded by one broadcaster who observed: "We live or die . . . by the FCC gun."

Bazelon, "First Amendment and the New Media," *supra* n.74 at 78 (ellipsis in original).

[184] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 164-65 (Douglas, J., dissenting).

[185] *See, e.g.*, Geller/Lampert Comments, *supra* n.83 at 10-11 n.4.

[186] Bazelon, "FCC Regulation," *supra* n.180 at 239.

defending fairness doctrine challenges in both administrative and judicial forums, in complying with the requirement to broadcast controversial issues of public importance, and in airing alternative viewpoints to these controversial issues.[187]

78. In addition to these economic burdens, the administration and enforcement of the doctrine imposes regulatory costs upon the Commission. We receive thousands of inquiries and complaints concerning the fairness doctrine annually,[188] each of which requires an individualized evaluation or response by our staff. In the course of assessing the merits of a complaint, the Commission's staff may seek further information from the Complainant. If it determines that the complainant has established a *prima facie* case, the staff may request justification from the licensee, thereby precipitating potentially costly administrative litigation, which, when terminated, is subject to judicial review, with its attendant costs.[189] Contrary to the position of some commenters,[190] therefore, we do not believe that the economic burdens incurred by the Commission in administering the fairness doctrine are *de minimus*.

79. In evaluating the propriety of a policy, the costs associated with the rule are to be balanced against its benefits. As a consequence, the significant economic costs associated with the administration of the fairness doctrine are a necessary factor in a considered evaluation of whether or not retention of the fairness doctrine comports with the public interest. By this assertion we do not imply that the administrative costs standing alone would be sufficient to justify the elimination of the doctrine. To the contrary, these costs might be justified were it demonstrated that the doctrine increased the amount of controversial issue programming and that its retention was necessary to assure that the public had access to the marketplace of ideas. In a situation in

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[187] *See* Section III, B.1, *supra*.

[188] For example, in 1984 our staff received 6,787 inquiries and complaints regarding the fairness doctrine.

[189] The United States Court of Appeals has recently determined that a complainant whose fairness doctrine claim is denied by the Commission has the right to seek judicial review (*Maier v. FCC*, *supra* n.125) and it is possible that this determination will increase the amount of appellate litigation, with its attendant costs, involving the fairness doctrine. Because appellate fairness doctrine litigation necessarily entails the involvement of Commission, the United States Department of Justice and the courts, the administrative expenses of each of these governmental agencies must be taken into account in assessing the economic burdens associated with the fairness doctrine.

[190] *See, e.g.*, MAP/TRAC Comments, *supra* n.50 at 134; "Comments of the American Civil Liberties Union" at 11 [hereinafter cites as "ACLU Comments"].

which there are no counterveilling justifications, however, we believe that even a moderate amount of administrative costs may consititute substantial justification for the elimination of regulation. For example, we have recently stated that regulatory costs are a significant criterion in justifying repeal of a rule "especially when the other factors considered indicate that the need for the rule has been effectively eliminated and that the rule imposes significant costs on both the public and the broadcast industry."[191] We find that these factors are applicable with respect to the fairness doctrine because, as discussed, the doctrine "chills" the broadcast of controversial issue programming and, as explained below, is not required to assure that the public has access to diverse viewpoints.

80. For the reasons set forth above, we find that the fairness doctrine, in operation, has the effect of inhibiting the presentation of controversial issues of public importance. We also believe that the doctrine operates to favor the expressions of orthodox viewpoints and to require unwarranted scrutiny by the Commission into program content. In addition, we find it provides a vehicle by which governmental officials can intimidate broadcasters for partisan political purposes. Moreover, we determine that the doctrine, in operation, imposes significant economic costs upon the Commission and the broadcasting industry. As a consequence, on the basis of the record in this proceeding, we conclude that there are a number of significant detriments associated with the fairness doctrine. In the following section we will evaluate, in light of the current communications marketplace, whether or not there is any need for us to retain the doctrine.

G. Need for the Fairness Doctrine In Light of the Increase in the Amount and Type of Information Sources in the Marketplace

81. Our conclusions regarding the disutility of the fairness doctrine find further support by examining the current amount of

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[191] *Memorandum Opinion and Order* in MM Docket No. 84-19 FCC 85-225 (released May 8, 1985) at ¶ 17. It is well-established that if the benefits of retaining a policy are minimal or non-existent, even a relatively small administrative burden may be sufficient to justify repeal. For example, in assessing whether or not to eliminate the regional concentration rule, one factor which we considered was the regulatory costs associated that rule. Finding that the administration of that rule had resulted in a staff analysis of 71 construction permits or assignment applications annually, we determined that "this expenditure of staff time . . . constitute[d] an appreciable burden on the Commission" (*id.*) despite the fact that there only were three reported cases involving the regional concentration rule over a two-year period. *Id.*

diverse and antagonistic sources of information available in the marketplace. As we observed in the *Notice*, significant increases in the number and variety of information sources attenuates the need for a system of government imposed "fairness" with its corollary duty to discover and present controversial issues of public importance. The Commission's last assessment of the information marketplace, and its necessary relationship to the legal and policy underpinnings of the fairness doctrine, occurred in 1974. At that time the Commission concluded:

> The effective development of an electronic medium with an abundance of channels through the use of cable or otherwise is still very much a thing of the future. *For the present*, we do not believe that it would be appropriate — or even permissible — for a government agency charged with the allocation of the *channels now available* to ignore the legitimate First Amendment interests of the public. (*emphasis added*) [192]

82. More than a decade has passed since this examination. During this time, we have witnessed explosive growth in various communications technologies. We find the information marketplace of today different from that which existed in 1974, as many of the "future" electronic technologies have now become contributors to the marketplace of ideas. As will be discussed below, the growth of traditional broadcast facilities, as well as the development of new electronic information technologies, provides the public with suitable access to the marketplace of ideas so as to render the fairness doctrine unnecessary. Moreover, we find that the dynamics of the information services marketplace overall insures that the public will be sufficiently exposed to controversial issues of public importance.[193] Accordingly, we no longer believe it appropriate to continue a system of government imposed obligations requiring licensees to discover and "fairly" address controversial issues of public importance. We believe that elimination of the fairness doctrine would not only promote discussion of such issues, but also pay greater fidelity to fundamental First Amendment values.[194]

83. Our analysis of the growth in the information services marketplace and the impact of this development on the underpinnings of the fairness doctrine shall begin with a discussion on the nature and scope of that market. We shall then evaluate the

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[192] *1974 Fairness Report*, 48 FCC 2d at 6.

[193] *See WNCN Listener's Guild v. FCC*, 450 U.S. 582, 594 (1981); *Office of Communications of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983) [hereinafter cited as *"UCC v. FCC"*].

[194] *See FCC v. National Citizens Committee for Broadcasting*, 436 U.S. at 795. (the public interest necessarily invites reference to First Amendment principles).

current status of this marketplace. Special emphasis will be given to the growth of information sources since the Supreme Court's decision in *Red Lion Broadcasting* and our previous evaluation of the communications marketplace in the *1974 Fairness Report*. As a final matter, we will address the availability of these information sources and the incentives to provide coverage to controversial issues of public importance.

1. Nature and Scope of the Information Services Marketplace

84. The Commission has previously addressed this specific issue in the context of a television station licensee's programming obligations. In our decision deregulating the programming guidelines for commercial television, we noted that the relevant information marketplace includes a variety of information sources such as cable television, Low Power Television (LPTV), Multipoint Distribution Service (MDS), Multichannel Multipoint Distribution Service (MMDS), Satellite Master Antenna Service (SMATV), and other electronic technologies.[195] Moreover, the Commission, in formulating its policy concerning a licensee's responsibility to provide programming directed at children, stated that broadcasters could consider the programming alternatives available on both cable and public television in deciding how to meet their own nondelegable duty.[196] This policy was later affirmed by the United States Court of Appeals.[197]

85. The Commission has also addressed the issue of determining the relevant information marketplace in fashioning its rules regarding concentration of ownership. For example, we took particular note of the rise in the multiplicity of nonbroadcast media voices when eliminating the regional concentration of control rules.[198] More recently, the Commission addressed this issue in a proceeding revising its national multiple ownership rules.[199] In this context the Commission noted:

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[195] *Television Deregulation*, 98 FCC 2d at 1086 and 1138.

[196] *Report and Order* in MM Docket No. 19142, 96 FCC 2d 634 (1984), *aff'd sub nom. Action for Children's Television v. FCC*, 756 F.2d 899, 901 (DC.. Cir. 1985) (per curiam) [hereinafter cited as *"ACT v. FCC"*].

[197] *ACT v. FCC*, 756 F.2d at 901.

[198] *See Regional Concentration, supra* n.177.

[199] *Report and Order* in Gen. Docket No. 83-1009, FCC 84-350, 49 Fed. Reg. 31877 (August 9, 1984), *recon. granted in part, Memorandum Opinion and Order*, FCC 84-638, 50 Fed. Reg. 4666 (February 1, 1985), *appeal docketed sub nom. National Association of Black Owned Broadcasters v. FCC*, No. 85-1139 (D.C. Cir. filed March 4, 1985).

> The record in this proceeding supports the conclusion that the information market relevant to diversity includes not only TV and radio outlets, but cable, other video media and numerous print media as well. In the *Notice*, we took account of the fact that these other media compete with broadcast outlets for the time that citizens devote to acquiring the information they desire. That is cable, newspapers, magazines and periodicals are substitutes in the provision of such information.[200]

That the various media are in fact information substitutes in the marketplace of ideas is further reflected in our local cable and television, newspaper and broadcast, radio and television cross-ownership rules.[201]

86. Against this background, the issue in this proceeding is whether or not there are inherent differences among various media outlets so as to prevent substitutability with respect to the presentation of controversial issues of public importance. We find nothing in this record which would cause us to arrive at a conclusion different from these prior decisions.[202] Accordingly, for the purpose of analyzing the fairness doctrine, we believe it is appropriate to consider traditional broadcast services, new electronic media and print as all part of the information services marketplace.

87. Several commenters argued that broadcasting, particularly television, is such a dominant information source that there are no other realistic information alternatives.[203] These commenters frequently point to studies indicating that television is both the primary and most believed source of information in the country.[204] We do not believe that the purported dominance of one media voice necessarily detracts from the significance of other voices with respect to the availability of antagonistic and diverse sources of information. The success of one particular medium in

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[200] *Id.* at 31880.

[201] *See* 47 C.F.R., § 73.3555(b) [one to a market]; 47 C.F.R. § 76.501 [co-located cable-broadcast TV cross-ownership]; and 47 C.F.R. § 73.3555(c) [co-located newspaper-broadcast cross-ownership.]

[202] Indeed, as we will discuss, *infra*, growth in the television and radio services alone may obviate the need for the fairness doctrine. *See* ¶ *104, infra.*

[203] *See, e.g.*, "Comments of General Motors Corporation, International Paper Company and Campbell-Ewaid Company on Notice of Inquiry" at 10, [hereinafter cited as "GM Comments"]; "Comments of the Democratic National Committee, Democratic Congressional Campaign Committee and Democratic Senatorial Campaign Committee at 7-8, [hereinafter cited as "DNC Comments"].

[204] Commenters generally cite to the *Roper Study* for the proposition that broadcasting, especially television, is the most utilized and the most believed source of news and informational programming. *See* The Roper Organization Inc., *"Public Attitudes Toward Television and Other Media in Time of Change"* May 1985 [hereinafter cited as the *"Roper Study"*].

attracting large audiences does not necessarily provide an appropriate justification for imposing governmently mandated fairness. Moreover, the data do not suggest that other media voices are somehow unavailable. Studies demonstrating the alleged dominance of television broadcasting are based on data in which television was selected as one of several information sources used by the respondents.[205] Such data merely serve to demonstrate the interchangeability of information options.[206]

88. Similarly, we are not persuaded by those who argue that newspapers and broadcast facilities are in different information markets because newspapers must be read as opposed to television or radio which may be casually watched or monitored.[207] For the purposes of the policies adopted herein, we can find no important regulatory distinction in the fact that an individual watches television, listens to the radio or reads a newspaper. That individuals edit and process information from the various media using different senses or while performing different tasks does not suggest that the information sources exist in separate isolated corners within the marketplace of ideas. In this regard, we believe that our regulatory concerns are best limited to considerations involving the *availability* of information sources. Concerns involving the manner in which the individuals mentally process the information from these outlets generally should not be of regulatory significance.[208]

89. A related argument concerns the fact that broadcasting, unlike almost all other media sources, is subject to substantial and direct government regulation.[209] We do not believe that a

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[205] In this regard, the *Roper Study* acknowledges that multiple answers have been accepted when people have named more than one medium. *Id.* at 3.

[206] Indeed, it appears that reliance on a particular media voice may depend on the type of issue *e.g.*, national, local etc. For example, a recent study published by the American Society of Newspaper Editors found that 50 percent of the respondents trusted newspapers more than television in trying to understand a difficult local news story. Only 37 percent of all respondents said they would trust television more in understanding local news. *Editor and Publisher*, Apr. 13, 1985, at 9.

[207] *See* MAP/TRAC Comments, *supra* n.50 at 75.

[208] Furthermore, we disagree with MAP/TRAC's contention that television broadcasting is unique because it has a captive audience. *Id.* at 76 n.76. MAP/TRAC's own analysis regarding the ability to listen to broadcasting while resting, working or driving is inconsistent with the captive audience hypothesis. Moreover, reliance on the Supreme Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. at 749, as evidence of the captive audience theory is misplaced. The Supreme Court has acknowledged that the decision is limited to situations involving children and indecent language. *See FCC v. League of Women Voters*, 104 S.Ct. at 3118.

[209] *See, e.g.*, MAP/TRAC Comments, *supra* n.50 at 61.

system of government licensing affects the substitutability of information among the various media voices. While such a system may influence entry into the information services marketplace, a licensing scheme, in and of itself, does not provide a proper distinction for the purpose of assessing the impact of broadcasting as a diverse information voice.[210] Moreover, as we observed when adopting our co-located newspaper cross-ownership rules, nonregulated information sources may be considered in formulating Commission policy.

90. In addition, we do not believe that purported price differences among the various information sources necessarily place them in separate information markets. While programming from traditional advertiser based broadcast facilities has been considered a "zero priced good," there is no evidence in the record suggesting that the alleged price differentials between these facilities and other "pay" media are significant enough to preclude interchangeability among information systems.[211] Indeed, the monthly cost of a daily newspaper may be comparable to or even less than the monthly cost of basic cable service.

91. Several commenters suggested that newer technologies such as pay cable, STV, MDS, DBS are not adequate information substitutes with respect to the provision of issue related programming. As will be discussed *infra*, we believe there are sufficient incentives to insure the presentation of programming that addresses controversial issues of public importance. These incentives exist not only for traditional broadcast facilities, but also for the newer electronic technologies.[212]

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[210] In this regard, we note that even assuming costs associated with the limitations of the Commission allocations scheme, the actual barriers to entry in terms of capital costs, may be lower for radio and television broadcasting than for daily newspapers. *See* Wirth, Michael, *Economic Barriers to Entry Daily Newspapers vs. Television Stations vs. Radio Stations*, August 1984, *cited* in NAB Comments, *supra* n.79 App. Vol., App. C.

[211] We note that while there are no subscription fees for over-the-air broadcasting, there may be costs involved in viewing "free" over-the-air television. Such costs would take the form of opportunity costs lost while watching unwanted program material.

[212] *See* ¶¶ 129–131, *infra*. Some Commenters also argued that the newer electronic technologies will not provide coverage to local controversial issues. We find this argument unpersuasive. Existing fairness obligations regarding the coverage of controversial issues of public importance do not necessarily require that the issue be solely of local importance. In this regard, controversial issues confronting a particular community may be national in scope and may be sufficiently addressed by "national programming." Moreover, we note our prior decisions in which we observed that programming addressing local issues need not be produced at the local level. *See Television Deregulation*, 98 FCC 2d at 1085, *citing WPIX, Inc.*, 68 FCC 2d 381, 402 (1978)

92. In sum, we find the record in this proceeding supports the conclusion that the various print and electronic media exist in a widely diverse and competitive information marketplace. We now turn to a consideration of the current availability of these diverse media outlets.

2. Status of the Information Services Marketplace

93. As we observed in the *Notice*, there has been explosive growth in the communications marketplace since the inception of the fairness doctrine in 1949. Of particular significance is the development of the marketplace since the Supreme Court's decision in *Red Lion Broadcasting* in 1969 and our subsequent analysis of the market in the *1974 Fairness Report*.[213] In the following analysis, we will focus on the major participants in the information services marketplace: (a) over-the-air broadcasting, (b) substitute electronic technologies and (c) the print media.

(a) Broadcasting

94. The growth and development of radio broadcasting since the inception of the fairness doctrine has been dramatic. The total number of radio stations has increased by 280 percent since the *1949 Fairness Report*. Moreover, there has been a 48 percent increase in the number of radio stations since the Supreme Court's decision in *Red Lion* and a 30 percent increase since the Commission's *1974 Fairness Report*. During the period the most significant growth occurred in the FM service where there has been a 113 percent increase since *Red Lion* and a 60 percent increase since our *1974 Fairness Report*.

Number of Radio Stations

	1949	1969	1974	1985
AM	1877	4256	4407	4787
FM	687	2330	3094	4979
Total	2564	6595	7501	9766

Source: 1949, 1969, 1974 (on-air stations) data from *Television and Cable Factbook*, Cable and Services Volume No. 52 (1984): 1985 data from FCC release No. 5080, June 11, 1985.

[213] *See Red Lion Broadcasting Co. v. FCC, supra* n.10; *1974 Fairness Report, supra* n.3.

95. Of particular significance is the fact that the number of radio voices available in each local market has grown.[214] In this regard, we note that competition resulting from an increase in the number of radio outlets was the primary factor in our decision to deregulate the program guidelines, commercial limitations and formal ascertainment requirements for commercial radio.[215] Moreover, there has also been a fundamental change in the structure of the radio market. Once predominently an AM only service, radio is now composed of two very competitive services. For example, at the time of the *1974 Fairness Report* there were over a thousand more on-air AM stations than FM stations. Since that time, however, FM has eclipsed AM as the largest radio service. Because of its higher fidelity, the growth of FM constitutes a significant improvement in the quality of radio service to the public. The development of radio can also be seen in the diversity of its program distribution systems. At the present time, there are approximately 11 national radio networks and 90 regional radio networks.[216]

96. We also note that the number of radio outlets will continue to increase with the further development of spectrum efficient technologies. Recently, the Commission allocated 689 new FM channels and adopted new procedures to assist in the development of these allotments.[217] In addition, we have recently adopted new application procedures which are designed to streamline the processing of these new FM allotments as well as the existing 152 vacant FM allotments.[218] With respect to AM service, the Commission in 1980 acted in limit the protection from interface afforded Class I-A clear channel stations so as to increase spectrum availability for new AM radio services.[219] More recently,

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[214] Data submitted by NAB demonstrates that generally the growth of radio voices has generally occured throughout the various radio markets. *See* NAB Comments, *supra* n.79 App. Vol., App. A at 19-63. These data confirm the Commission's previous conclusions regarding overall growth in radio markets. *See Inquiry and Notice of Proposed Rule Making* in BC Docket No. 79-219, 73 FCC 2d 457, 548-551 (1979).

[215] *Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968 (1981), *recon. denied*, 87 FCC 2d 797 (1981), *rev'd on other grounds sub nom. UCC v. FCC*, *supra* n.193 (hereinafter cited as "Radio Deregulation").

[216] *Broadcasting/Cablecasting Yearbook*, (1985) at F1-61.

[217] *See Report and Order* in Docket No. 80-90, 53 FCC 2d 1550 (1983); *First Report and Order* in MM Docket No. 84-231, 50 Fed. Reg. 3514 (January 25, 1985); *Second Report and Order* in MM Docket No. 84-231, FCC 85-124 (released April 12, 1985).

[218] *See Universal Filing Period, Public Notice*, FCC No. 4699 (May 22, 1985). *See also Report and Order* in MM Docket No. 84-750, FCC 85-125, 50 Fed. Reg. 19936 (May 13, 1985).

[219] *See Clear Channel Broadcasting in the AM Broadcast Band*, 78 FCC 2d 1345

the Commission in various proceedings has adopted policies making more efficient use of existing spectrum as well as enlarging that portion of the spectrum available for AM broadcast use.[220]

97. Equally significant has been the dynamic growth of over-the-air television broadcasting. The statistics presented below show the development of this medium.

Number of Television Stations

	1949	1969	1974	1985
VHF (Total)	51	577	605	654
Commercial	—	499	513	541
Educational	—	78	92	113
UHF (Total)	0	260	333	554
Commercial	0	163	184	369
Educational	0	97	149	185
Total	51	837	938	1208

Source: 1949, 1969 and 1974 (on-air stations) data from *Television Factbook*, Cable and Services Volume No. 52 (1984); 1985 data from FCC publication No. 5080 June 11, 1985.

98. As the above data demonstrate, there has been a 44.3 percent increase in the overall number of television stations since the Supreme Court's decision in *Red Lion Broadcasting*. This represents a 13.3 percent increase in VHF stations and a dramatic 113 percent increase in UHF stations. Television growth since the Commission's *1974 Fairness Report* has also been significant, amounting to a 28 percent increase in the overall number of television stations with 66.4 percent increase in UHF stations.

99. The continued growth in television broadcasting has led directly to an increase in signal availability in local markets.

(1980), *recon. denied*, 83 FCC 2d 216 (1980), *aff'd sub nom. Loyola University v. FCC*, 670 F.2d 1222 (D.C. Cir. 1982).

[220] *See, e.g.*, *Report and Order* in MM Docket No. 84-281, FCC 85-224 (released May 7, 1985) (foreign nightime AM clear channels); *Report and Order* in MM Docket No. 84-752, FCC 85-150 (released April 24, 1985) (AM rules and international agreements); *Notice of Proposed Rule Making* in MM Docket No. 85-39, FCC 85-75 (released March 12, 1985) (AM application criteria); *Second Notice of Inquiry* in Gen. Docket No. 84-647, FCC 84-644 (released January 11, 1985) (preparation for ITV conference); *Report and Order* in BC Docket 82-538, FCC 83-412, 48 Fed. Reg. 42944 (September 30, 1983), *recon. denied in part*, FCC 84-591 (released December 4, 1984) (AM daytime operations).

Stations Receivable Per TV Household

Number of Stations Receivable

	1-4	5-6	7-8	9-10	11-14	15-19	20+
1984	4%	11%	21%	22%	24%	15%	3%
1972	17%	22%	30%	21%*	—	—	—
1964	41%	33%	18%	8%*	—	—	—

* 9+ stations

Source: *Nielson Report on Television*, 1985 at 2.

As of 1984, 96 percent of the television households received five or more televisions signals. This figure represents a significant increase in actual signal availability since 1972, where only 83 percent of the television households received five or more signals. The increase in even more dramatic compared to 1964 when only 59 percent of television households were capable of receiving 5 or more stations. Today, only 4 percent of the television households receive fewer than five signals. These statistics demonstrate a significant growth in signal availability throughout the country. Of particular significance is the fact that these figures are based on over-the-air reception and do not include the enhanced signal availability achievable with cable television. The significance of cable television as a factor in increasing the number of available signals will be discussed, *infra*. These data generally confirm statistics supplied by several commenters which demonstrate an increase in signal availability in both large and small markets.[221]

100. Increases in the number of outlets and signal availability does not necessarily provide a complete picture of the fundamental structural changes occurring in the television marketplace. For

[221] A study of signal availability submitted by NAB generally confirms this conclusion. NAB examined the growth of television signals in large markets (ADI 1-50), medium markets (ADI 50-100) and small markets (ADI 101+). Of particular interest is the increase in signal availability in small markets. Of the thirty-one small markets surveyed, seventeen had both an increase in signal availablilty since 1974 and a projected increase by 1990. Four markets showed an increase in signal availability since 1974 but had no projected increases. Ten markets exhibited no growth in signal availability between 1974 and 1984. However, seven of these markets anticipated increases in signal availability by 1990. Only three markets exhibited both no growth between 1974-1984 and no projected growth. However, one of these markets had four available signals and the remaining two markets had achieved significant cable penetration. *See* NAB Comments, *supra* n.79 App. Vol., App. A at 48-63.

example, UHF television, once thought to have occupied second class status, is now a significant voice in the marketplace.[222] Indeed, the growth of this service — 113 percent since *Red Lion* — is evidence of its economic viability. Concomitant with the growth in UHF stations has been the increased importance of independent television. As the Commission observed in its television deregulation decision, the growth of UHF independent television stations has added an important new voice in the information marketplace.[223] Since 1970, the number of independent television stations has grown from 90 to 214 stations, an increase of 107.7 percent.[224] Moreover, the growth in independent television stations has not been confined to a few large markets. As of 1984, independent stations were located in 98 different markets and reaching 82 percent of all television households.[225]

101. The impact of the rise of independent television stations can be seen in the steady decline of the network's audience share. As the Commission previously observed, the overall network audience share declined from 90 percent to 80 percent in 1983.[226] This trend continues as the overall network share dropped from 80 percent in 1983 to 76 percent in 1984.[227] In television households without cable television, the network share of the audience declined from 89 percent in 1983 to 85 percent in 1984. During this time period, non-network television usage in these housholds increased from 17 percent in 1983 to 21 percent in 1984. Moreover, non-network television stations were able to maintain their share of the television audience even in households subscribing to either pay cable or basic cable service.[228]

102. Further structural changes can be seen in the development

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[222] We note that while there always be physical differences between UHF and VHF services, these differences do not necessarily mean that UHF stations will not be a viable force in the television marketplace. *See Report and Order* in Gen. Docket No. 78-391, 90 FCC 2d 1121, 1124 (1982). Moreover, cable television has enhanced the ability to receive UHF stations thereby making it comparable to VHF television in markets that have been wired.

[223] *See Television Deregulation*, 98 FCC 2d at 1083 (1984).

[224] The growth in independent television stations has occurred primarily in the UHF television services. In 1970 there were 59 UHF independents compared to 155 in 1984. *Id.* at 1139 [1970 data]; Data of 1984 taken from *Broadcasting*, Jan. 7, 1985, at 82.

[225] *See Broadcasting*, Jan. 7, 1985, at 82.

[226] *Television Deregulation*, 98 FCC 2d at 1139.

[227] *Nielson Report on Television*, (1985) at 12.

[228] In households subscribing to pay cable services, the audience share of non-network stations increased from 16 percent in 1983 to 18 percent in 1984. During this same period the audience share of these stations remained stable — 20 percent — for homes subscribing only to basic cable service. *Id.*

of new program distribution systems among group owners.[229] We believe these alternative systems will not only provide new programming sources, but also enhance the economic viability of local independent television stations. Moreover, our recent modification to the natural multiple ownership rules is expected to foster the development of these new systems, thereby enhancing diversity at the local level.[230] In this regard, the development of these stronger voices may facilitate the ability of these stations to address controversial issues of public importance.[231]

103. We also note that additional grown can be achieved by utilizing vacant allocations and improved spectrum efficient technologies. Currently, there are a total of 54 vacant VHF channels and 462 vacant UHF channels.[232] Of these vacant allocations, 34 are commercial VHF channels and 109 commercial UHF channels. These vacancies appear in both large and small markets. For example, in the top 50 markets there are 32 commercial UHF vacancies. Moreover, 19 of these UHF vacancies are located within fifty-five miles of their respective titled ADI cities. There are also 20 noncommercial HF vacancies and 353 noncommercial UHF vacancies available nationwide. In addition, the Commision and others have conducted several studies demonstrating the technical feasibility of various UHF improvements, including enhanced reception, thereby reducing the impact of the traditional UHF "taboos".[233] Such improvements have the potential of increasing the number of UHF stations available in each market. These technological improvements combined with the number of vacant channels suggest that there is sufficiently available spectrum to anticipate continued growth in the number of television broadcast facilities.

104. Given the significant development of both radio and television, we believe it is no longer necessary to utilize a

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[229] For example, as of January 1985, Gannett Broadcasting Group, Hearst Broadcasting, Metromedia Inc., Storer Communications and Taft Broadcasting (prior to its merger with Gulf Broadcasting), representing 32 stations reaching 45 percent of television households had established a consortium to produce programmings. *See Broadcasting*, Jan. 7, 1985, at 86.

[230] *See Memorandum Opinion and Order*, 50 Fed. Reg. at 4670.

[231] We also note that the changes in the national multiple ownership rules will assist in the acquisition of those stations which were formerly devoted to subscription television. *Broadcasting*, Jan. 7, 1985, at 86 and 90.

[232] *Television Channel Utilization*, FCC No. 3723, Apr. 9, 1985.

[233] *See, e.g., Program to Improve Television Reception*, Georgia Institute of Technology, September 1980; J. B. O'Neill, *Television Receiver Noise Figure Study*, North Carolina State University, February 1980.; A. Stillwell, and R. Wilmotte, *Spectrum Requirements of UHF Television with Current and Improved Tuning*, FCC Office of Plans and Policy, 1978.

mechanism of government imposed "fairness" in order to insure appropriate coverage of controversial issues of public importance. As the above data amply demonstrate, there are a sufficient number of over-the-air television and radio voices to insure the presentation of diverse opinions on issues of public importance.[234] Our decision in this proceeding is guided to some extent by the underlying policies expressed in the radio and television deregulation proceedings.[235] In both decisions, the Commission found that the growth of the broadcast medium created sufficient economic incentives to attenuate the need for each licensee to provide "well balanced something for everyone programming." Similarly, we believe that the growth in both radio and television broadcasting provide reasonable assurance that a sufficient diversity of opinion on controversial issues of public importance will be provided in each broadcast market. In this regard, we note that even if there has been no increase in alternate electronic information sources, the growth and development of both the radio and television markets by themselves make the fairness doctrine an unnecessary regulatory mechanism.

(b) Substitute Electronic Technologies

105. In addition to traditional over-the-air television and radio broadcasting, we find that there exist numerous alternative electronic technologies making a significant contribution to the marketplace of ideas. The importance of these technologies, especially cable television, in the policy making context was recently recognized by the United States Circuit Court of Appeals.[236] We believe that in the context of this proceeding consideration should be given to the contributions of cable television, low power television (LPTV) multichannel multipoint distribution service (MMDS), video cassette recorder (VCR), satellite master antenna systems (SMATV) and other electronic media including recent advancements in satellite technology.

106. Universally recognized as a significant non-over-the-air

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[234] This diversity is illustrated further by the combined coverage of both television and radio signals. For example, in a separate proceeding CBS claims that its television station in New York City emcompasses 196 radio stations within it Grand B Contour. Moreover, CBS asserts that its New York television station must compete with 278 radio stations which provide service to some portion of the area covered by its Grade B contour. *See* "CBS Reply Comments" filed with *In re Application of Turner Broadcasting System, Inc.*, File No. BTCCT-850418 *et al*, June 1985 at 60.

[235] *See Radio Deregulation*, supra n.215; *Television Deregulation, supra* n.177.

[236] *ACT v. FCC*, 756 F.2d at 901.

electronic medium, cable television has developed from a means of improving reception into a major industry providing video programming. Early data show that in 1952, three years after the *1949 Fairness Report*, there were 70 operating cable systems with an estimated 14,000 subscribers.[237] At the time of the Supreme Court's decision in *Red Lion* there were 2,260 systems in operation with an estimated 3.6 million subscribers.[238] By the time of our *1974 Fairness Report*, there were 3,158 operating cable systems with a reported 8.7 million subscribers.[239] As of 1985 there are 6,600 operating cable systems in 18,500 communities with approximately 1,600 franchises that have been approved but not built.[240] According to recent A. C. Neilson estimates, U.S.cable households now number 38,673,270 placing national cable penetration at 43.3% of all television households.[241] In comparative terms, the number of cable systems in operation has increased 195 percent since *Red Lion* and 111 percent since the Commission's *1974 Fairness Report*. Growth in subscribership amounts to an astronomical 975 percent since the *Red Lion* decision and 345 percent increase since the *1974 Fairness Report*. Moreover, cable television will continue to expand in the future. According to a recent study by Arthur D. Little Inc., the number of cable subscribers will increase to 48 million by 1990.[242] In addition, industry revenue is expected to double from 8.4 billion in 1984 to 16.5 billion in 1990. During this period after tax revenues are expected to triple from $600 million in 1984 to 1.7 billion in 1990.[243]

107. The importance of cable's development, however, is not limited to increases in the number of systems. Indeed, there has been a significant change in the nature of cable service. For example, at the time of the *Red Lion* decision only 1 percent of all cable systems had the capacity to carry more than 12 channels.[244] As of April 1, 1984, 58 percent of the cable systems exceed 12

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[237] *Television and Cable Factbook*, Cable & Services Volume No. 52 (1984) at 1735.

[238] *Id.*

[239] *Id.*

[240] *Broadcasting/Cablecasting Yearbook*, (1985) at D-3.

[241] *Broadcasting*, June 17, 1985 at 10.

[242] *Prosperity for Cable TV: Outlook 1985-1990*, Arthur D. Little Inc., *cited in Broadcasting*, June 10, 1985 at 32. This may be a conservative estimate. As we have noted elsewhere, some analysts expect cable penetration to be 60 percent by 1990, reaching 58 million subscribers. *See Television Deregulation*, 98 FCC 2d at 1138. Another source has estimated that cable penetration will reach 54 percent by 1990. *Cablefile*, (1985) at III-26.

[243] *Id.*

[244] *Notice, supra* n.1 at 37 n.47 *citing* B. M. Compaine, C. H. Sterling, T. Guback and J. K. Noble, Jr., *Who Owns the Media* (2nd ed. 1982) at 418.

channels. Most importantly, however, systems limited to 12 channels or less comprise only 18.63 percent of total cable subscribers.[245] The significance of cable television is also demonstrated by its ability to increase the number of viewing options available to the public. The following table illustrates the importance of cable by comparing the number of stations receivable per television household to the number of channels receivable with cable television.

Stations and Channels Receivable
Per TV Household in 1984

	1-4	5-6	7-8	9-10	11-14	15-19	20+
Number of Channels Receivable (includes cable)	3%	5%	9%	9%	29%	16%	29%
Number of Stations Receivable (absent cable)	4%	11%	21%	22%	24%	15%	3%

Source: Nielson Report on Television, (1985) at 2.

With the inclusion of cable telvision, the number of households capable of receiving more than six television signals increases from 85 percent of all television housholds to 92 percent of all television households. Similarly, the percentage of television households capable of receiving more than ten television signals increases from 42 percent to 74 percent. The most dramatic increase in signal availability appears in households receiving 20 or more signals. Absent cable, these households comprise only 3 percent of all television households as compared with 29 percent of all television households when cable is considered. The importance of increased channel capacity is enhanced by the ready availability of a wide variety of cable networks which provide a significant array of diverse programming. As one commenter has noted, there are approximately twenty-eight basic cable networks

[245] *Television and Cable Factbook*, Cable & Service, Volume No. 52, 1984 at 1726.

not including four super stations.[246] Many of these networks have highly specialized program formats including news channels such as the Cable News Network, the Financial News Network, and public affairs programming such as C-Span.[247] In addition, there are approximately 10 pay cable networks in operation.

108. Apart from the growth in the number of cable systems, we find that the pattern of development in small markets to be particularly relevant to the objectives of this proceeding. The record in this proceeding clearly demonstrates that cable services are in important media voice in small markets. Cable penetration rates in these markets are far in excess of the national average and significantly higher when compared with larger broadcast markets.[248] The high penetration levels in these small markets suggest that there is a significant degree of substitutability between cable and over-the-air television broadcasting.

109. We also note that the Cable Communications Policy Act of 1984 will play an important role in expediting further development of cable technology.[249] Congress intended to establish a national policy that encourages the growth and development of cable television as well as insuring that cable systems are responsive to the needs and interests of the local communities they serve.[250] Under the Act, a franchising authority is able to establish and designate channels for public, educational or government (PEG) use as well as commercial access channels for systems with 36 or more activated channels.[251]

110. Another developing voice in the information services market is Low Power Television (LPTV). These stations are over-the-air television broadcast facilities, generally limited to 10 watts for VHF and 1,000 watts for UFH stations. These facilities were nonexistent at the time of the *Red Lion* decision and our

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[246] *See* NAB Comments, *supra* n.79 App. Vol., App. A at 4.

[247] Additional growth in cable networks can be expected. For example, the Discovery Channel recently commenced operation offering a basic cable service of educational, non-fiction, science and nature programming free to cable operators. *Multichannel News*, June 24, 1985 at 1.

[248] For example, an analysis of NAB's data concerning 31 of the smallest television markets (100+) reveals a combined average subscription rate of approximately 57 percent, almost fourteen percentage points higher than the national average. *See* NAB Comments, *supra* n.79 App. Vol., App. A.

[249] Cable Communications Policy Act of 1984, Pub. L.No. 98-549, 98 Stat. 2779 (1984).

[250] *See* House Committee on Energy and Commerce, H.R. Rep. No. 931, 98th Cong. 2d Sess. at 19 (1984); *See also Report and Order* in MM Docket No. 84-1296, FCC 85-179 (released Apr. 19, 1985) at 28-37.

[251] *Id.* at 30.

1974 Fairness Report. Stations of this power were translators, limited to the rebroadcast of signals from full service stations. In 1982, the Commission authorized these stations to originate programming.[252] There are currently 126 licensed low power UHF stations and 215 low power VHF stations.[253] It is predicted that this source will eventually add an additional 4000 television stations to the marketplace. Moreover, the most significant administrative problems inhibiting initial development of this new service have been rectified with the establishment of new processing procedures designed to expedite the development of this medium.[254]

111. LPTV significantly expands the information marketplace. Allocation policies have emphasized placing these facilities in smaller markets were there are fewer over-the-air full service television facilities. With lower entry and operating costs, LPTV can be an important source of local programming in rural areas. In larger markets, LPTV will be able to target its audience to specific communities or ethnic groups.[255] A recent economic study provides some evidence that this service appears to be commercially viable in certain areas of the country.[256]

112. At the time of the *1974 Fairness Report*, multipoint distribution service (MDS) was just beginning to develop as a communications service. Used primarily to provide subscription programming via microwave transmissions, there were approximately 438,578 MDS subscribers out of a potential audience of 13.1 million at the end of 1984.[257] Confined to offering a single pay channel, MDS subscription declined slightly from 1983 levels.

113. Expectation of growth in MDS will likely involve the development of multichannel MDS systems. With the reallocation of 8 channels from Instructional Fixed Television Service, multichannel MDS will be able to offer multiple channels as

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[252] *See Report and Order*, in BC Docket No. 78-253, FCC 82-107, 47 Fed. Reg. 21468 (1982).

[253] FCC release No. 5080, June 11, 1985.

[254] *See Report and Order* in MM Docket No. 83-1350, FCC 84-492 (adopted October 18, 1984).

[255] *Legal Times*, Dec. 8, 1984, at 1; *Wall Street Journal*, Oct. 23, 1984, at 1.

[256] The study, conducted by Kompas Beil Associates, indicates that LPTV may already be a viable service in some areas. Of the stations initially responding to its survey, 16 stations were non-profit religious stations, 8 were operating as subscription television, 10 were operating as non-profit educational stations. Sixteen stations were operating on a commercial basis with fourteen of these stations reporting a profit. Two of the stations were temporarily off the air with copyright problems. *Videography*, Apr. 1985 at 72.

[257] Paul Kagen Associates, Inc., *Multicast Newsletter*, Apr. 17, 1985.

opposed to a single viewing option.[258] Added to this are leases available from ITFS operators leading to MMDS systems of up to twenty two channels. As of February 1985, there were 16,499 applications on file with the Commission.[259] The advantage of this service is that construction costs and time delays are greatly reduced, relative to cable, since wiring to a headend is not necessary. Estimates of subscribership growth by 1990 range between 6 to 12 million subscribers.[260]

114. Satellite Master Antenna Systems (SMATV) are similar to cable systems except that they are built in individual apartment complexes, condominiums, hotels and trailer parks. These "private" cable systems did not exist at the time of the *Red Lion* decision or our *1974 Fairness Report.* The Commission's decision not to regulate these systems, coupled with preemption of state and local regulation, has facilitated the development of this service.[261] According to the National Satellite Cable Association about 600,000 to 800,000 homes have been wired with this service.[262] Because of lower capital and construction costs, SMATV systems have become increasingly popular in both rural and urban areas that are currently unserved by cable television.[263]

115. Sales of video cassette recorders continue to have a major impact on the information marketplace. As with many other new technologies, VCR's were not readily available at the time of the *1974 Fairness Report.* The impact of this technology on other electronic video technologies has been significant. By the end of 1985 it is estimated that there will be 23.3 million VCR homes representing 27.4 percent of all TV households.[264] A more recent study of VCR penetration reported that sales are running about one million a month and will reach critical mass penetration of one third of all homes by early 1986. According to the report the term "critical mass" is used to describe the penetration level that

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[258] *See Report and Order* in Gen. Docket 80-112, 94 FCC 2d 1203 (1983).

[259] *Broadcasting*, Feb. 11, 1985, at 56.

[260] *Television Deregulation*, 98 FCC 2d at 1140.

[261] *See Memorandum, Opinion Declaratory Ruling and Order* in in CSR 2347, 95 FCC 2d 1223 (1983), *recon. denied*, FCC 84 206 (May 14, 1984), *affd. sub nom. New York State Commission on Cable Television v. FCC*, 749 F.2d 805 (D.C. Cir. 1984).

[262] *New York Times*, Dec. 5, 1984, at 30. A more conservative estimate was provided by Paul Kagen Associates who estimated subscribership at 290,000. Paul Kagen Associates, *SMATV News*, Apr. 25, 1984.

[263] *New York Times*, Nov. 13, 1983, at 47; *See also New York Times*, Dec. 19, 1982, at 1.

[264] *Television/Radio Age*, May 27, 1985, at c7 (*citing* Paul Kagen Associates).

establishes the technology as a mass medium.[265] Further estimates place VCR usage at 67.9 million homes representing 68 percent of all television households by 1990.[266]

116. We take particular note of the development of video recordings as a means of disseminating issue related video programming.[267] We find this to be a significant development in the information marketplace. To the extent VCR's do not utilize spectrum, anyone who desires to communicate by television may do so by means of a VCR. In this regard, we agree with NBC that VCR's have the potential to become the "electronic handbills" or indeed even the electronic newspaper of the future.[268] Moreover, our own empirical analysis of the relationship between VCR's and television reveals that a VCR is both a substitute and a complement to over-the-air and cable television.[269] In other words, VCR's act not only as a means of time shifting programming, but also as an independent source of programming. Moreover, the ability to reschedule video programming gives viewers the opportunity to acquire additional information from other sources. By time shifting, viewers are able to reallocate their time so as to increase the number of potential viewing options.[270] We believe that the flexibility afforded the public by VCR's, represents an important qualitative development in the information services marketplace.

117. The above mentioned electronic technologies are the most prominent alternatives to over-the-air broadcasting in today's marketplace. There are other electronic services, however, that have the potential of becoming substitute information sources in the marketplace of ideas. We do not, however, find them to be significant contributors to the marketplace at this time.

118. The direct to home satellite services (DBS) is still in the beginning stages of development. Using the Ku satellite band,

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[265] *Broadcasting,* July 8, 1985, at 14 (*citing* a study conducted by Young & Rubicam USA).

[266] *Id.*

[267] *UCC* notes in its Comments that there are currently 72 titles considered public affair by the publishers. Similar categories such as "Civil Rights" (54 titles) and "Documentaries" are also included. *See* UCC Comments, *supra* n.170 at 3.

[268] *See* NBC Comments, *supra* n.86 at 88.

[269] J. Levy and P. Pitsch, *Statisical Evidence of Substitutability Among Video Delivery Systems,* FCC Office of Plans and Policy, April 1984. *See also* J. Levy and F. Setzer, *Measurement of Concentration in Home Video Markets,* FCC Office of Plans and Policy, December 23, 1982.

[270] According to Neilson data, 59 percent of all recordings are made with the television set turned off, 17 percent occurs while viewers are watching a different channel and 24 percent of viewers record from the channel they are watching. *Neilson Report on Television,* (1985) at 13.

this service generally provides programming directly to households. Households using this service either rent or purchase a small one meter-earth station. The first direct broadcast satellite services was authorized by the Commission in 1982.[271] Of the eight original applicants, three have been granted orbital and channel assignments and launch authority. In 1984, the Commission granted six additional applications for DBS service.[272] One of these grantees has been given launch authority as well as its orbital and channel assignment. Currently, the Commission has pending before it six DBS applications seeking either to modify existing grants or apply for new allocations.[273] It appears, therefore that despite the recent setbacks, there is a continued interest in the development of DBS service.[274]

119. Another important element prompting the development of satellite direct service is the continued growth in the home earth station market. Latest reported data indicate that there are approximately one million existing earth stations and estimates of growth range between 40,000 to 80,000 per month.[275] Moreover, the Cable Communications Policy Act of 1984, which clarified the legality of receiving satellite signals, may provide an additional spur to this already expanding market.[276] Because of the poten-

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[271] *See Direct Broadcast Satellite Services,* 90 FCC 2d 676 (1982) *recon. denied,* FCC 83-241, (released May 19, 1983), *rev'd, United States Satellite Broadcasting Company, Inc. v. FCC,* 740 F.2d 1177 (D.C. Cir. 1984); *Satellite Television Corporation,* 91 FCC 2d 953 (1982); *CBS, Inc.,* 92 FCC 2d 64 (1982). *See also GTE Satellite Corporation,* 90 FCC 2d 1009 (1982) *recon. denied,* FCC 83-271 (released June 23, 1983). Of the eight original grantees, four were able to demonstrate due diligence in proceeding with the development of their respective DBS systems. *See CBS, Inc.,* FCC 84-477 (released October 10, 1984). Two of the parties failing to meet the due diligence requirements have re-applied to the Commission for DBS authorization.

[272] *See Satellite Syndicated Systems Inc.,* FCC 84-608 (released December 16, 1984).

[273] *See Public Notice* "DBS Applications Accepted for Filing" Rep. No. DBS 2-B (released April 4, 1985). Three of these applicants are existing grantees seeking additional channels. Two of the three applicants seeking new DBS authorization were previously granted such authority but failed previously to meet the Commission's due diligence requirements.

[274] Earlier this year, U.S.C.I. terminated service to its approximately 10,000 subscribers. *DBS Newsletter,* April 1985 at 1. This DBS service was not a Commission licensee but rather utilized Canada's Telesat Anik C-II satellite. While this system did not prove to be a commercial success, it did demonstrate the technical feasibility of Ku band direct satellite service. *See Broadcasting,* July 8, 1985 at 52.

[275] *See Broadcasting,* July 8, 1985, at 52.

[276] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, §5(b), 98 Stat. 2779 (1984). This section amended section 705 of the Communications Act by allowing the reception of any satellite cable programming for private viewing

tially enormous market, some traditional cable programmers have suggested scrambling their signals to provide a direct to home satellite service from their C band satellites.[277] Facilitating the development of this system is the oversupply of transponders which will lower the costs of transmission making this form of program particularly attractive.[278] While the development of a C-band direct system is still in the planning stage, there appears to be significant movement towards developing this service.[279]

120. Satellite technology has also played a significant role in enhancing existing information services. For example, satellites have allowed local television stations to increase their capability to gather news. Satellite news gathering (SNG) has become an important element in providing regional coverage.[280] In addition, satellite technology has become an important part of the syndication market.[281] The nationwide access afforded by this technology increases the opportunities for another source of programming through ad-hoc networking, thereby increasing viewpoint diversity in local markets.

121. An additional alternative technology is subscription television (STV). STV is a pay service that sends over-the-air television signals, in a scrambled mode, to its subscribers. The number of STV outlets has declined in recent years due primarily to increased cable penetration. As of June 30, 1984 there were approximately 701,042 STV subscribers and 19 STV channels operating in 17 markets.

122. Additional information technologies are continuing to be developed. The Commission has recently authorized the use of FM Radio subcarriers.[282] Subcarriers may be utilized for a variety of different functions such as "radio talking books", commodities information, stock quotes and news. The Commission has also

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if: (1) the programming involved is not encrypted and, (2) a marketing system has not been established.

[277] Descramblers for the reception of HBO, which scrambles part of its programming, are already being manufactured. Approximately 25,000 headend descramblers have been produced and parts have been ordered for 100,000 consumer units which will be distributed to wholesalers next fall. *See Broadcasting,* July 8, 1985, at 83.

[278] *Id.* at 46.

[279] *See Broadcasting,* July 1, 1985, at 87; *Broadcasting* July 8, 1985, at 52.

[280] *See Broadcasting,* July 8, 1985, at 60.

[281] *Id.* at 58. In this regard, we note that continued development of satellite technologies will facilitate the development of new program distribution systems. *See* ¶ 102, *supra.*

[282] *Report and Order* in BC Docket No. 82-536, FCC No. 83-1154, 48 Fed. Reg. 28445 (June 22, 1983); *Second Report and Order* in BC Docket No. 82-536, 97 FCC 2d 23 (1984), *recon. denied,* FCC 84-313, 98 FCC 2d 433 (1984).

authorized the use of teletext by television licensees.[283] This system uses the vertical blanking interval for transmitting pages of text which are formatted on the users screen with the use of a decoder. Videotext is also a potential source of information. At the present time, this service has approximately 500,000 subscribers.[284] As a final matter home computer systems have played a significant role in adding to the information services marketplace. However, we do not find these services to be significant contributors to media diversity at this time.

(c) Print Media

123. As we observed in the *Notice* the overall number of broadcast facilities exceeds the total number of daily newspapers in the United States. This does not mean, however, that the print media is not a significant contributor to the information marketplace. As of 1984, there were 1,701 daily newspapers in the country.[285] During this period, average circulation increased to 62,544,503, an increase of 157,426 from 1983 levels.

124. In analyzing the information marketplace, however, we agree with those commenters who felt that the *Notice* gave insufficient consideration to the importance of other print sources such as weekly and even monthly newspapers and magazines. According to the *Notice,* the total number of periodicals has increased from 6,960 in 1950 to 10,688 in 1982. As commenters such as MAP and UCC point out, these newspapers are significant source of information, especially local information, which is available to consumers in each market.[286] The viability of newspapers as an important information source is further illustrated by the volume of advertising appearing in each medium. According to this criterion, advertising expenditures for newspapers exceeded both television and radio.[287] Moreover, the com-

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[283] *Report and Order* in MM Docket No. 81-741, 48 Fed. Reg. 27054 (June 13, 1983).

[284] *Broadcasting,* July 1, 1985, at 64.

[285] *Editor and Publisher Yearbook,* (1984) at VIII. The figures are based on 1983 data and represent a decline of 10 newspapers when compared with 1982 figures. However, this decline was due to the merger of 10 daily papers and therefore, does not evidence a net decrease in the number of daily newspapers. During this period, 8 daily newspapers were discontinued but this was offset by new entries into the market. *Id.* at V.

[286] *See* MAP/TRAC Comments, *supra* n.50 at 86-90; UCC Comments, *supra* n.170 at 13.

[287] In 1983, the total advertising volume for the various media was approximately $20.1 million for newspapers, $16 million for television, $5.2 million for radio

bined advertising revenues for newspapers and magazines were greater than the combined total for television and radio. We believe that these data provide important evidence relative to the strength of newspapers and magazines as significant contributors to the marketplace of ideas.

3. Availability in the Information Market

125. Several parties have argued that the increases in the number of information outlets do not necessarily attenuate the need for the fairness doctrine.[288] Specifically, these parties state that overall increases in information service outlets are not necessarily sufficient to provide each market with diverse and antagonistic sources of information. The argument is predicted on two assumptions. First it assumes that the growth of information sources nationwide has had no impact on local markets. Second it assumes that these sources will not provide coverage to controversial issues of public importance. As noted below, we find the data upon which these assertions are based, flawed, and we are not persuaded by the logic of the arguments.

126. On the record before us, we find that the nationwide development of these diverse information sources has had a direct impact on the availability of information in each media market. For example, even in small markets such as El Paso, Texas (ADI market No. 104), there are a significant number of media vioces. According to data submitted by NAB, this market has seven television stations, twenty seven radio stations, two MDS channels, thirty thousand VCR's and cable penetration at 47 percent.[289] The most detailed refutation of this position appeared in a study conducted by Prof. Ralph Jennings.[290] The study sampled ten percent of the 3,926 communities in the United States which have at least one commercial or public radio station. It then inventoried each community's broadcast, newspaper, cable and multipoint distribution system and "examined the extent to which the communities share in the national communications wealth."

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and 4.1 million for magazines. *Television and Cable Factbook,* Services Volume No. 52 (1984) at 14.

[288] *See, e.g.,* "Comments of Black Citizens for a Fair Media, Citizens Communication Center, League of United Latin American Citizens, National Association of Better Broadcasting [hereinafter cited as "BCFM Comments"]; UCC Comments, *supra* n.170.

[289] NAB Comments, *supra* n.79 App. vol., App. A. at 49.

[290] R. Jennings, *Diversity of Communications Facilities in American Communities, cited* in UCC Comments, *supra* n.10 at App. B, and USCC Reply Comments, *supra* n.152 [hereinafter cited as "Jennings Study"].

We have carefully reviewed the data contained in the study and disagree with the methodology employed therein. At the outset, the study does not appear to provide a representative sampling of media markets throughout the United States. Rather, the study focuses primarily on small markets. Recognizing this problem, the study attempts to enlarge its sample by including 72 larger communities. However, the study itself recognizes that even with these communities the sample does not reflect the characteristics of the population as a whole.[291]

127. A second concern involves use of the "community" as the basic unit of analysis. The study assumes that a community is not being served unless a broadcast facility (or other information source) is located within the geographic boundaries of the community. As CBS correctly points out, the relevant inquiry is not what stations are licensed to a community, but rather what broadcast signals the community can actually receive.[292] In this regard, we note that the Commission has recognized that a broadcast licensee may serve communities which lie outside the strict geographic boundaries of its community of license.[293] Moreover, such methodology may underestimate the availability of broadcast facilities and other information services such as cable and local newspapers.[294]

128. On the record before us, we cannot find that there are a insufficient number of voices in local markets to warrant continuation of the fairness doctrine. As we observed previously, increases in signal availability for traditional broadcasting facilities — television and radio — by themselves attenuate the need for a government imposed obligation to provide coverage to controversial issues. The existence of a plethora of alternate

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[291] *Id.* at 10.

[292] "Reply Comments of CBS, Inc." at 22 [hereinafter cited as "CBS Reply Comments"].

[293] *See, e.g., Report and Order* in B.C. Docket No. 82-374, FCC 83-487, 54 RR 2d 1343 (1983), *recon. denied,* 56 RR 2d 797 (1984); *Report and Order* in B.C. Docket No. 82-320, 93 FCC 2d 436 (1983), *recon. denied,* FCC 84-335 (released July 31, 1984).

[294] The following example illustrates the potential problems inherent in the study's analysis. The study reports the following cities as not having cable television service in their community: Birch Tree, Missouri and Marshall, North Carolina. However, each of these towns is served by a cable system in which the corporate headquarters of the cable system is located outside of the community. *See Television and Cable Factbook,* Services Volume No. 52 (1984) at 997 and 1151. Similar concerns exist with respect to local newspapers. For example, the study reports that the town of Weston, Massachusetts did not have a local newspaper. However, the town is served by a weekly newspaper that covers local issues, but it is published in a neighboring town. *See Wayland/Weston Town Crier* (Weston Edition), July 3, 1985 at 1.

electronic voices, as well as numerous locally oriented print voices, augments this argument. Further support for this conclusion can be found from the homogeneity of the various media systems. Thus, in communities with few television stations one can expect to find higher cable subscribership. For example, the Jennings study found that cable was available in 82 percent of the communities surveyed. Similarily, in large urban areas with no cable systems, there are generally numerous television outlets. Moreover, data submitted by NAB confirms fungibility of the various information service technologies.[295]

129. Several commenters have argued that absent the fairness doctrine there will be no incentive for broadcasters to provide coverage to controversial issues of public importance. These parties also assert that the new electronic technologies are unable to address these types of issues, particularly at the local level. We are not persuaded by these arguments.

130. We note that other information systems, such as the print media, devote a significant amount of time to controversial issues in the absence of a government imposed obligation to do so. For these media, the incentive to cover such issues is not the fear of government sanction, but rather economic necessity. Similar incentives exist for over-the-air broadcasting. Our experience with industry performance persuades us that radio and television broadcasters would be sufficiently motivated to provide coverage to controversial issues of public importance in the absence of fairness doctrine obligations. Indeed, assuming *arguendo* that television is the most relied upon information source, then there is a strong market incentive to cover such issues in response to the demand.[296] As we have observed in other proceedings, marketplace forces are the primary determinants of information oriented programming.[297] Moreover, given our previous analysis regarding the chilling effect of the fairness doctrine, we believe it reasonable

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[295] *See* NAB Comments, *supra* n.79 App. Vol., App. A at 48–63.

[296] Evidence of a marketplace demand for programming covering controversial issues of public importance can be seen in the employment patterns of news staffs after our television and radio deregulation decisions. A recent study of the effects of deregulation conducted by RTNDA found that: "[M]ost radio stations have not changed their news or public affairs staffing or programming as a result of deregulation. Most TV stations also plan to continue business as usual. News cutbacks have come mainly at radio stations in major markets where changes have drawn attention and accusations against deregulation. But while some news directors may have lost staff members because the FCC lifted its minimum requirements, other [sic] say they are doing a better job because of the greater freedom." *RTNDA Communicator,* May 1985 at 1.

[297] *See generally, Deregulation of Television, supra* n.177; *Deregulation of Radio, supra* n.215.

to expect an increase in the coverage of these types of issues. In any event, there is no reason to believe that there will be a decline in the coverage of controversial issues of public importance.

131. Apart from the incentives of traditional broadcast facilities, we believe that other media systems will provide sufficient amounts of programming covering controversial issues of public importance. Cable television, for example, is already providing various informational programming such as CNN and the Financial News Network. Moreover, many cable systems are originating their own programming and have local community access channels. Increased availability of VCR's will also provide an important outlet for discussion of issues in each market. Most importantly, local newspapers will remain as an important source of locally oriented information.[298] All of these sources will make significant contributions to the marketplace of ideas.

H. The Fairness Doctrine Can Not Be Justified on the Basis that It Protects Either Broadcasters or the Public from Undue Influence.

132. As noted above,[299] the Commission historically justified the retention of the fairness doctrine on the sole basis that affirmative regulatory intervention was necessary to vindicate the interest of the public in obtaining access to diverse viewpoints on controversial issues of public importance. Our evaluation of the fairness doctrine both in terms of its efficacy and its continued need in the communications marketplace today is based upon this expressed regulatory objective. Several participants in this proceeding, however, have argued that the retention of the doctrine furthers other regulatory goals. Specifically, these parties argue that there are legitimate "protective" functions which are promoted by the continued existence of the doctrine. In this section we will assess the merits of these arguments.

133. Several commenters contend that retention of the fairness doctrine is useful as a "protection against outside pressures"[300] by groups within the community which would otherwise exert

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[298] In light of our conclusion that sufficient incentives exist to provide coverage to controversial issues among the traditional broadcast media, reliance on alternate electronic technology systems to provide coverage to such issues is not a necessary element in our decision. We note, however, that these information sources are significant contributors of issue oriented information. In this regard, their performance makes the elimination of the fairness doctrine even more compelling.

[299] *See* ¶¶ 4, 23, *supra.*

[300] "Comments of the United States Catholic Conference" at 19 [hereinafter cited as "USCC Comments"].

undue influence on the editorial decisionmaking of broadcasters. Absent the fairness doctrine, these parties contend that broadcasters will simply "cave-in" to the pressures of advertisers,[301] political action committees,[302] or other powerful groups in the community[303] who do not wish to have particular controversial viewpoints expressed.[304]

134. We take issue with the assumption that intrusive governmental regulation is necessary to "protect" broadcasters from groups which allegedly attempt to influence their programming decisions. The First Amendment forbids governmental intervention in order to "protect" print journalists and we believe that broadcast journalists are in no greater need of "protection" than their counterparts in the print media. We think it telling, in this regard, that broadcasters themselves are not seeking this protection. Moreover, the framework of broadcast regulation is predicated in large part upon reliance on the editorial discretion of

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[301] *See, e.g., id*; DNC Comments, *supra* n.203 at 17; *See also* USCC Reply Comments, *supra* n.152 at 9.

Indeed, without providing any support for its assertion, the Democratic National Committee ("DNC") argues that "the potential fear [of broadcasters] of offending a power group in the community that buys advertisements was the reason the Fairness Doctrine was adopted in the first place." *Id.* at 17. As described above, the articulated reason for the establishment of the fairness doctrine was to further access by the public to diverse viewpoints on controversial issues of public importance. Our historic justification of this doctrine was not based upon an expressed concern that regulatory intervention was necessary to counterbalance the alleged influence exerted by advertisers—or any other group—on licensees with respect to their decisions concerning the broadcast of controversial issue programming.

[302] DNC Comments, *supra* n.203 at 15–16.

[303] The most expansive articulation of this argument was expressed by Ecumedia. In its Reply Comments, it stated that the fairness doctrine provided broadcast journalists with the means to deflect pressure exerted by "external sources including politicians, public officials, corporations, advertisers, organized community groups and outspoken individuals [as well as] [i]nternal pressure from station management or parent companies. "Reply Comments of Ecumedia," at 19. [hereinafter cited as "Ecumedia Reply Comments"].

[304] For example, asserting that the fairness doctrine operates as an effective "insulating" mechanism, DNC argues that:

> The Fairness Doctrine actually protects a broadcaster who does not want to take this safe course of cozy relations with its community's financial elite . . . .
>
> Many broadcasters go to great lengths to present issues of public importance and offer their audiences balanced coverage. For them, the Fairness Doctrine has been a valuable shield. When pressured by demands from established powers in its community to suppress coverage of an unpopular issue or to support their political points of view, a broadcaster today can simply point to his or her responsibilities under the Doctrine.

DNC Comments, *supra* n.203 at 18.

broadcast journalists. As the Supreme Court has stated, the Communications Act "manifest[s] the intention of Congress to maintain a substantial measure of journalistic independence for the broadcast licensee."[305] Consequently, consistent with their public interest responsibilities, broadcasters are accorded wide discretion under the Communications Act with respect to their programming decisions.[306] We are not convinced that broadcasters have been unduly pressured by groups within the community in the past. Moreover, in our view, the speculative notion that, absent the fairness doctrine, they will be unable to resist undue pressure in the future is a wholly inadequate basis upon which to justify the continued existence of rules which intervene in the editorial decisionmaking process of broadcast journalists. Rather, we deem it appropriate to rely, as we have in the past, upon the good faith judgment of the licensee regarding the selection of programming material.[307]

135. In addition, several commenters, in support of the fairness doctrine, argue that the doctrine serves to safeguard the public against unwarranted influence by what they perceive as biased broadcast reporting.[308] Although the commenting parties differ among themselves in their perception of the bias to which they object,[309] they believe that retention of the fairness doctrine is

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[305] *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. at 116. Indeed, the Supreme Court, in addressing the editorial discretion of broadcast journalists under the Communications Act, has recognized that "[f]or better or worse, editing is what editors are for; and editing is selection and choice of material." *Id.* at 124.

[306] The Court has asserted that:

> In the delicate balancing historically followed in the regulation of broadcasting Congress and the Commission could appropriately conclude that the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many. This policy gives the public some assurance that the broadcaster will be answerable if he fails to meet its legitimate needs.

Id. at 125.

[307] Reliance upon the editorial discretion of broadcast licensees also furthers First Amendment principles. As the United States Supreme Court has stated:

> Indeed, if the public's interest in receiving a balanced presentation of views is to be fully served, we must *necessarily* rely in large part upon the editorial initiative and judgment of the broadcasters who bear the public trust.

FCC v. League of Women Voters of California, 104 S.Ct. at 3117 (emphasis added).

[308] *See, e.g.,* "Comments of the American Legal Foundation" at 10-14 [hereinafter cited as "ALF Comments"].

[309] There appears to be a sharp divergence of opinion among the commenters making this argument as to the precise nature of the alleged "bias." For example, one party asserts that the bias of the broadcast media is liberal (*Id.* at

appropriate to prevent broadcasters from presenting biased or one-sided programming. The argument apparently is predicated upon the presumption that the requirement to provide "balanced" controversial issue programming is not merely a means to assure access to the marketplace of ideas but is itself a valid regulatory objective.

136. Balance may be a laudable editorial goal, but there are grave dangers when the government tries to strike that balance. First, as we have just noted above, determining what constitutes balanced programming is a very subjective endeavor. Second, as we have described, having the government attempt to achieve balance by means of enforcing the fairness doctrine results in a chilling effect to the ultimate detriment of the listening public. Third, there are the inherent dangers of an arm of the federal government influencing the content of programming in an attempt to guarantee balance. Further, the First Amendment does not require and may well not permit a neat apportionment, dictated by the government, in the marketplace of ideas, with equal space assigned to every viewpoint. As the Supreme Court noted in *First National Bank v. Bellotti*:

> [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people can not evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment.[310]

The fact that a particular viewpoint may have the capability to be extremely influential or offensive does not mean that it is accorded a lesser degree of First Amendment protection than the expression of less influential or more reasonable opinions.[311] Therefore, we do not believe that the "protection" of the viewing and listening public against even allegedly one-sided presentations

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11); another participant argues that the media is biased "toward the business and commercial community." "Comments of the Maine Nuclear Referendum Committee" at 1. Still another commenter contends that the broadcast media unduly favors the views of the alleged "Zionist/Israeli lobby." Letter to the Chairman, Federal Communications Commission from Richard Hill and Donald W. Harris (Oct. 20, 1984).

310 *First National Bank of Boston v. Bellotti*, 435 U.S. at 791-92.

311 As the Supreme Court has asserted, "[t]he Constitution 'protects expression which is eloquent no less than that which is unconvincing.' " *Id.*, *quoting Kingsley International Pictures Corp. v. Regents*, 360 U.S. at 689.

affords a justifiable basis for the retention of the fairness doctrine.[312]

I. Summary

137. We believe the fairness doctrine is an unnecessary and detrimental regulatory mechanism. While we recognize that the fairness doctrine has been a central tenet of broadcast regulation for more than fifty years, we believe that we have a statutorily mandated duty to reassess the propriety of even long standing policies in light of changes in the broadcast marketplace and evidence that the policy may not further the public interest. After careful evaluation of the evidence of record, our experience in enforcing the fairness doctrine, and fundamental constitutional principles, we find that the fairness doctrine disserves the public interest.

138. Three factors form the basis for this determination. First, in recent years there has been a significant increase in the number and types of information sources. As a consequence, we believe that the public has access to a multitude of viewpoints without the need or danger of regulatory intervention.

139. Second, the evidence in this proceeding demonstrates that the fairness doctrine in operation thwarts the laudatory purpose it is designed to promote. Instead of furthering the discussion of public issues, the fairness doctrine inhibits broadcasters from presenting controversial issues of public importance. As a consequence, broadcasters are bundened with counterproductive regulatory restraints and the public is deprived of a marketplace of ideas unencumbered by the hand of government.

140. Third, the restrictions on the journalistic freedoms of broadcasters resulting from enforcement of the fairness doctrine contravene fundamental constitutional principles, accord a dangerous opportunity for governmental abuse and impose unnecessary economic costs on both the broadcasters and the Commission. Finally, we believe the record in this proceeding raises significant

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[312] Justice Douglas has stated that:

> The implication that the people of the country—except the proponents of the theory—are mere unthinking automatons manipulated by the media, without interests, conflicts, or prejudices is an assumption which I find quite maddening. The development of constitutional doctrine should not be based on such hysterical overestimation of media power and underestimation of the good sense of the American public.

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 152 n.3.

issues regarding the constitutionality of the fairness doctrine in light of First Amendment concerns.

IV. Modifications Short of Repeal and Alternatives to Current Enforcement of the Fairness Doctrine

141. In addition to those comments which favored complete repeal or retention of the fairness doctrine, a number of proposals were offered to modify the doctrine's scope or otherwise limit its application.[313] For example, several commenters urged elimination of or limitation on the scope of the *Cullman* doctrine corollary to the fairness doctrine.[314] Specifically, ABC proposed that ballot proposition advertising and advertising by independent political committees should be exempted from the *Cullman* doctrine. In lieu of *Cullman*, ABC recommended an approach modeled on the Commission's *Zapple* doctrine,[315] under which reasonable amounts, but not free, response time would be required as a means of achieving the Commission's fairness objectives. It was also urged by some commenters that all advertising be exempted from application of the fairness doctrine. Additionally, a two year moratorium on enforcement of the fairness doctrine was proposed as a means of empirically evaluating the impact of the doctrine on broadcast speech.

142. Beyond the above suggestions, the record reflects a number of proposals which have been previously considered by the Commission in connection with its fairness doctrine requirements. In this regard, Henry Geller again recommended that the current contemporaneous, case-by-case review of fairness doctrine complaints should be abandoned in favor of examining fairness compliance solely at renewal. It was also proposed that broadcast licensees be permitted to satisfy their fairness doctrine obligations by providing on-air "access" time to the public.

143. While these various proposals may present possibilities in

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[313] Several parties addressed elimination or retention of the Personal Attack Rule. However, as we stated in the *Notice* in this proceeding, our review here is limited to the fairness doctrine and does not include the Personal Attack Rule, which is the subject of a separate, pending proceeding. *Notice, supra* n.1 ¶ 9 n.10 and *Repeal or Modification of the Personal Attack and Political Editorial Rules* , 48 Fed. Reg. 28295 (June 21, 1983).

[314] For a discussion of the *Cullman* doctrine and its evolution, see n.119 *supra.*

[315] *Nicholas Zapple*, 23 FCC 2d 707 (1970). The Zapple doctrine requires that if supporters, or spokesmen, for one political candidate appear on a broadcast station, supporters for opposing candidates must be afforded similar treatment. However, the doctrine only applies to major political parties during formal campaign periods and does not require the provision of free time.

terms of reducing the intrusive impact of the fairness doctrine, we do not believe it is approproate to consider them at this time, given our intention to defer action on the fairness doctrine generally, pending review of the record in this proceeding by Congress.

V. Agency Authority to Modify or Repeal the Fairness Doctrine

144. Given our policy conclusions as to the continued undesirability of the fairness doctrine, the question arises whether we have the authority to eliminate or substantially modify the fairness doctrine. In this regard, issues pertaining to our statutory authority were clearly raised in the *Notice*[316] and addressed by numerous commenting parties in this proceeding. As we observed in the *Notice*, we do not believe that Congress explicitly codified the fairness doctrine prior to the 1959 Amendments to the Communications Act. Nor do we find that the fairness doctrine necessarily inheres in the public interest standard of the Communications Act. The 1959 amendments to the Communications Act pose a more difficult question. For the reasons we have earlier stated, however, we need not reach this question.[317] Rather, we will afford Congress an opportunity to review the record adduced in this proceeding. In order to provide a full and complete record in connection with such review, we have set forth below the arguments in this proceeding with respect to codification of the fairness doctrine.

A. Pre-1959 Period

145. We begin our examination of the legal authority of the Commission to eliminate or modify the fairness doctrine in the period prior to the 1959 amendments to ascertain whether or not the doctrine was codified either explicitly within the Communications Act or implicitly as part of the general obligation of broadcasters to serve the public interest.[318] In this regard, we note at the outset that neither the Radio Act of 1927 nor the Communications Act of 1934 contained any explicit provisions indicating that Congress intended to mandate that broadcasters

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316 *See Notice*, *supra* n.1 at ¶¶ 96–120.

317 *See* ¶ 7, *supra*.

318 For a detailed examination of the pre-1959 period *See Staff Study of the House Committee on Interstate and Foreign Commerce, Legislative History of the Fairness Doctrine*, 90th Cong., 2d Sess. (Comm. Print. 1968) [hereinafter cited as "Manelli Report"].

provide fairness in their coverage of controversial issues of public importance.

146. Indeed, in 1927 Congress specifically addressed the question of whether or not there was a need to statutorily require fairness in the discussion of controversial issues of public importance. When enacting Section 18 of the Radio Act of 1927,[319] the forerunner of Section 315 of the present Communications Act, Congress had before it in the House of Representatives language in the bill, H. R. 9971 of the 69th Congress, that would have required broadcasters to provide equal access to "both the proponents and opponents of all political questions or issues."[320] At the same time, the Senate was considering a provision recommended to it by its Commerce Committee which would have prohibited broadcasters from discriminating in the use of their facilities "for the discussion of any question affecting the public."[321] Neither of these provisions survived the House-Senate Conference. The Conferees rewrote the radio bill without the proposed fairness-type language.[322] Since there was no explanation in the Conference Report as to why the fairness-type language was excluded, we must conclude that Congress did not desire to explicitly mandate a fairness type obligation on broadcasters at that time.

147. Section 18 of the Radio Act of 1927 became Section 315 of the Communications Act of 1934. Yet, before it was encacted into law, attempts were made in the Senate to enlarge the scope of this section to impose a fairness standard on any discussion of public questions to be voted upon at an election. Specifically, the language proposed in the Senate would have required that:

> if any licensee shall permit any person to use a broadcasting station in support of or in opposition to any candidate for public office, or in the presentation of views on a public question to be voted upon at an election, he shall afford equal opportunity to an equal number of other persons to use such station in support of an opposing candidate for such public office, or to reply to a person who has used such broadcasting station in support of or in opposition to a candidate, or for the presentation of opposite views

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[319] Section 18 of the Radio Act of 1927 read, in pertinent part:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station . . .

(44 Stat. 1170).

[320] 67 Cong. Rec. 5,560-61 (1926).

[321] S. Rep. No. 772, 69th Cong., 1st Sess. (1926).

[322] H. R. Rep. No. 1886, 69th Cong., 2d Sess. (1927).

> on such public questions. Furthermore, it shall be considered in the public interest for a licensee, so far as possible, to permit equal opportunity for the presentation of both sides of public questions.[323]

In the House, the Committee on Interstate and Foreign Commerce reported a substitute bill that did not contain the provision providing for "equal opportunity" in the discussion of public questions.[324] Minus the proposed fairness-type language, the Conference Committee incorporated Section 18 verbatim as Section 315 of the Communications Act of 1934.[325] Once again attempts to include fairness-type language explicitly into the Communications Act had failed.

148. The 1952 amendments were the last revisions to Section 315 of the Communications Act prior to 1959. The 1952 Amendments to the Communications Act added another provision to section 315 which provided for uniformity of charges for political time vis-a-vis other uses. While in the House of Representatives, an amendment was offered to alter Section 315 to extend the "equal opportunity" provision to include statements made by authorized spokesmen of candidates,[326] this language was omitted from the bill by the Conferees.[327] Given these various attempts to legislatively mandate some form of fairness standard, it is apparent that, prior to 1959 at least, Congress had steadfastly refused to statutorily require broadcasters to provide fairness in the coverage of controversial questions and issues of public concern.

149. Despite the lack of legislative support for a mandatory fairness obligation, as evidenced in these early expressisons of legislative intent by Congress in not explicitly codifying the fairness doctrine,[328] the Federal Radio Commission and later the

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[323] *See* S. Rep. No. 781, 73d Cong., 2d Sess. (1934) This same "fairness" type provision in H. R. 7716, had been introduced during the 72d Congress, H. Rep. No. 2106, 72d Cong., 2d Sess. 6 (1933). This bill was passed by Congress, but subjected to a pocket veto by President Hoover. *See Manelli Report*, *supra* n.318.

[324] H. R. Rep. No. 1850, 73d Cong., 2d Sess. (1934).

[325] *See* H. R. Rep. No. 1918, 73d Cong., 2d Sess. 49 (1934).

[326] 98 Cong. Rec. 7415 (1952).

[327] H. R. Rep. No. 2426, 82d Cong., 2d Sess. (1952). This omission was particularly relevant since by this time the Commission had developed the fairness doctrine pursuant to the public interest standard of the Communications Act.

[328] Indeed, as pointed out in the *Manelli Report*, *supra* n.318, some of the failures to enact fairness type legislation "cast serious doubts on the proposition that the Fairness Doctrine, at least in substance, is a necessary corollary of the 'public interest' standard contained in the Radio Act, and carried forward into the 1934 Communications Act." *Id.* The United States Supreme Court, however, has admonished that "unsuccessful attempts at legislation are not the

Federal Communications Commission imposed fairness obligations upon broadcasters. As early as 1929, the Federal Radio Commission in *Great Lakes Broadcasting Co.*,[329] declared that "[i]n so far as a program consists of discussions of public questions, public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies . . . to all discussions of issues of importance to the public."[330] The Federal Communications Commission followed its predecessor by requiring that licensees cover both sides of controversial issues.[331] These decisions culminated in the issuance of the definitive statement of the fairness doctrine obligations for broadcasters. It was in the 1949 *Report of Editorializing by Broadcast Licensees*,[332] that the Commission fully set forth the two prong requirements of the fairness doctrine.

150. The fairness doctrine, as enunciated by the Commission in the *1949 Fairness Report*, was not developed pursuant to any specific command in the Act requiring that a broadcaster "devote a reasonable percentage of time to the coverage of controversial public issues" or that the broadcaster provide fairness in the coverage of such issues. Rather, it was promulgated pursuant to the "expansive" powers delegated by Congress under the Act in order that the Commission might regulate the "field of enterprise the dominant characteristic of which was the rapid pace of its unfolding."[333] In particular, the fairness doctrine developed under the general authority of the Commission to devise regulations to insure licensees broadcast in the "public interest, convenience, and necessity."[334] Based upon its perceptions of the communica-

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best guides to legislative intent." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 381 n.11.

[329] 3 FRC 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930).

[330] *Id.* at 33.

[331] *See Young People's Association for the Propagation of the Gospel*, 6 FCC 178(1938). Moreover, the Commission in *Mayflower Broadcasting Corp.*, 8 FCC 333 (1941), gave an even more expansive meaning to the public interest standard while at the same time giving a more restrictive view of broadcasters' latitude under that standard. Specifically, the Commission determined that "as one licensed to operate in the public domain the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively and without bias . . . . These requirements are inherent in the conception of public interest set up by the Communications Act as the criterion of regulation." *Id.* at 340. While this decision was overturned because of its specific edict against editorializing by broadcasters, its interpretation of the public interest standard was carried forward in subsequent Commission cases.

[332] *See 1949 Fairness Report*, *supra* n.6.

[333] *National Broadcasting Company v. United States*, 319 U.S. at 219.

[334] *See* 47 U.S.C. §§ 303, 307(a), 309(a), 310(d). According to the United States

tions field in 1949, the Commission determined that "the public interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of contrasting views of all responsible elements in the community on the various issues which arise."[335] Thus, the Commission from the inception of the fairness doctrine has recognized that the sole statutory basis for the doctrine was the general duty of licensees to serve the public interest.[336]

151. Proponents of the fairness doctrine contend that the Commission can not eliminate the doctrine because it is an inherent and necessary element of the general public interest standard.[337] We believe, however, that the obligations of licensees under the public interest standard, including the fairness doctrine, were never meant to be unsusceptible to change. Nor do we conclude that the sole power to make such alterations in Commission policies promulgated pursuant to the general public interest standard rests with Congress. This conclusion is aptly supported by the United States Supreme Court which has long recognized that the public interest standard is not inflexible, but is subject to the "rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."[338] Over the years the Commission has often exercised its expert judgment and administrative experience to change policies once viewed by the Commission to be in the public interest. Given that the Commission is the expert agency in the field, courts have upheld the Commission's elimination of policies which were based solely on the public interest standard.[339] In so doing, the courts have generally relied heavily on the Commission's judgment regarding the best means to implement the broad public interest standard.[340] Indeed, the United States Supreme Court has posited that the Commission

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Supreme Court the public interest criterion "serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

[335] *1949 Fairness Report*, at 1250.

[336] *Id.* at 1254.

[337] *See, e.g.*, BCFM Comments, *supra* n.288 at 6-12; Geller/Lampert Comments, *supra* n.83 at 7-10; GM Comments, *supra* n.203 at 36-40; MAP/TRAC Comments, *supra* n.50 at 13-19; and Mobil Comments, *supra* n.128 at 12-17.

[338] *FCC v. Pottsville Broadcasting Co.*, 309 U.S. at 138.

[339] *See, e.g., FCC v. WNCN Listeners Guild*, *supra* n.193.

[340] *See FCC v. National Citizens Committee for Broadcasting*, 436 U.S. at 810 and *FCC v. WNCN Listeners Guild*, *supra* n.193; *see also UCC v. FCC*, *supra* n.193 and *Chisholm v. FCC*, 538 F.2d 349, 357 (D. C. Cir 1976).

should not hesitate to abandon existing policies "[i]f time and changing circumstances reveal that the 'public interest' is not served by application of the regulations."[341]

152. As we have already determined, as detailed above, the fairness doctrine no longer serves the public interest. Accordingly, if the only statutory basis for the fairness doctrine was the general public interest standard, the Commission upon a rationally based and clearly articulated finding would possess sufficient authority to abolish the doctrine.

B. The 1959 Amendments to the Communications Act

153. In 1959 Congress once again amended Section 315 of the Communications Act.[342] Primarily, the purpose of these amendments was to create an exemption from Section 315(a)'s equal opportunity requirement for certain types of news programs. After accomplishing its primary purpose in enacting the amendments, Congress set forth at the end of Section 315(a) a new proviso which apparently references the general fairness doctrine. In the *Notice*,[343] we offered three possible scenarios as to the possible statutory implications of the language espoused in the 1959 Amendments to the Communications Act. One construction of the amendments is that they were an explicit codification of the fairness doctrine in its entirety. The second possible interpretation is that the 1959 amendments only codified the fairness doctrine with respect to the political broadcasting realm to ensure that the purposes of the equal opportunities requirements would not be defeated by abuse of the newly created exemptions. A final construction is that Congress at that time did not codify the fairness doctrine at all, but merely acknowledged and preserved the Commission's policy in this area without statutorily mandating its continuance.[344] According to the arguments of the different commenting parties, evidence supporting all three propositions can be found in the statutory language of Section 315, as amended in the 1959 amendment to the Communications Act, its legislative history, subsequent court and legislative interpretations, as well as our own past interpretations.

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[341] *National Broadcasting Co. v. United States*, 319 U.S. at 225.

[342] *See Act of September 14, 1959*, §1, P. L. 66-274, 73 Stat. 556, amending 47 U.S.C. §315(a).

[343] *See Notice, supra* n.1 at ¶ 99.

[344] While different permutations of these constructions of the statutory implications of the 1959 amendments exist, we believe these three to be the most plausible.

1. The Statutory Language

154. We begin with the language in the statute itself. In this regard, we note that the United States Supreme Court has specifically concluded that "in determining the scope of a statute, one is to look first at its language" and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."[345] Of peculiar relevance to our inquiry is the last sentence of Section 315(a) which provides that:

> Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and *to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.*[346] (emphasis added)

Although this language appears clearly to reference the fairness doctrine obligation, its precise statutory implications are unclear. In this connection, several parties argued that this language could be read as a Congressional enactment of the fairness doctrine since its wording is quite similar to the language found in the second prong of the fairness doctrine as enunciated in the *1949 Fairness Report*. Contrarily, other commenters took the position that Congress is amending Section 315 desired to make clear that it had not disturbed the Commission's fairness doctrine policy, but did not mandate its continuance. Major commenting parties have advanced strong arguments on both sides of this controversy as to the precise meaning to be accorded this language.[347] Commenters, such as the National Telecommunications and Information Administration (NTIA), assert that "[o]n its face Section 315(a), as amended in 1959, indicates that Congress understood the Fairness Doctrine to be embodied in the Federal Communica-

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[345] *North Dakota v. United States*, 460 U.S. 300, 312 (1983), *quoting Consumers Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). *See also United States v. Yermian*, 104 S. Ct. 2936 (1984) and *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

[346] 47 U.S.C. §315(a) (1984).

[347] Some Commenters contend that the language in the last sentence of Section 315(a) specifically addresses itself to fairness regarding "controversial issues" in general. *See, e.g.*, MAP/TRAC Comments, *supra* n.50 at 48. Other parties point out the Congress spoke in terms of the obligation as being "under this Act" this they contend provides support for the argument that the fairness doctrine is merely a Commission policy developed pursuant to delegated authority under the general public interest standard of the act and not to anything directly in the Act. *See, e.g.*, CBS Comments, *supra* n.83 at 110–111.

tions Act."[348] Likewise, other proponents have found the language in the last sentence of section 315(a) to "plainly" mean that Congress intended to codify the fairness doctrine.[349]

155. On the other hand the RTNDA contends that "[o]n its face this language provides only that the amendments should not be construed to *relieve* broadcasters of fairness obligations; it neither states nor implies that Congress intended to change in any way the nature of the statutory authorization for the doctrine."[350] Moreover, opponents of the fairness doctrine argue that if Congress had intended this language to codify the fairness doctrine, it would have made its intent clear, as it has done in many other enactments.[351] Because the "plain" language of the statute has been interpreted to stand for more than one proposition, we examined the legislative history of the 1959 amendments to ascertain congressional intent.[352]

2. Legislative History

156. Congress in the 1959 amendments to Section 315 was responding in an expedited fashion to overturn the Commission's *Lar Daly* decision and avoid its possible ramifications.[353] In *Lar Daly*, the Commission had rules that Section 315's "equal opportunities" requirements applied to appearances of political candidates on newscasts.[354] Subsequently, broadcasters warned that if Congress did not act to correct this novel Commission

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[348] "Comments of the National Telecommunications and Information Administration" at 5 [hereinafter cited as "NTIA Comments"].

[349] *See, e.g.*, MAP/TRAC Comments, *supra* n.50 at 31-34; Geller/Lampert Comments, *supra* n.83 at 4; and Ecumedia Reply Comments, *supra* n.39 at 7-9.

[350] RTNDA Comments, *supra* n.141 at 13. Similarly, NBC argues that this language was merely a "savings clause" in that Congress "left pre-existing law—the Commission's authority to interpret the 'public interest' standard of the Federal Communications Act—undisturbed." NBC Comments, *supra* n.86 at 102. *See also* CBS Comments, *supra* n.83.

[351] *See* NBC Comments, *supra* n.86 at 105 (NBC points out that Congress made explicit the codification of a Commission policy when it enacted §317 requiring the public announcement of any sponsorship of a political or other controversial broadcast.) *See also* CBS Comments, *supra* n.83 at 111.

[352] As the United States Circuit Court of Appeals for the District of Columbia Circuit has stated, "[c]onstruing a statutory term, however, requires more than a superficial and isolated examination of the statute's plain words. Ascertaining congressional intent requires us to examine the 'context in which the words are set—the statute's purpose, structure, and history' . . . . " *Multi-State Communications, Inc. v. FCC*, 728F.2d 1519, 1522 (D. C. Cir. 1984) *quoting Natural Resources Defense Council, Inc. v. EPA*, 725 F.2d 761, 769 (D.C. Cir. 1984). *See also Viacom International, Inc. v. FCC*, 672 F.2d 1034, 1040 (2d Cir. 1982).

[353] *Lar Daly*, 26 FCC 715 (1959).

[354] *Id.*

interpretation of Section 315 the result might be a blackout of radio and television news coverage of political campaigns, including the upcoming national political conventions.[355] To prevent such an occurrence, Congress moved swiftly to enact legislation providing exemptions for news-type programming. Congress was mainly concerned with overturning the Commission's decision. Consequently, both the original bills drafted in the House of Representatives and Senate dealt primarily with correcting through legislation the *Lar Daly* decision.[356] Accordingly, the legislative history lacks clear record evidence demonstrating a reasoned consideration of the fairness doctrine which would indicate an intent by Congress to codify the doctrine. While there do exist scattered references to the obligations of broadcasters under the public interest standard to present both sides of controversial public issues by some members of Congress, there was no significant discussion of the Commission's fairness doctrine.

157. However, the Senate Committee Report—probably in response to concerns voiced by the Commission and the Department of Justice—provided that:

> In recommending this legislation, the committee *does not diminish or affect in any way* Federal Communications Commission policy or existing law which holds that a licensee's statutory obligation to serve the public interest is to include the broad encompassing duty of providing a fair cross-section of opinion in the station's coverage of public affairs and matters of public controversy.[357] (emphasis added).

This language appears to suggest that the Senate Committee did not wish to abrogate the Commission's policy developed pursuant to the Commission's delegated authority under the general public interest standard of the Act. It is argued that this language implies that the Senate did not intend to change the broadcasters

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[355] *See, e.g.*, 105 Cong. Rec. 14,447 (1959) (Remarks of Senator Hartke).

[356] *See* S. Rep. No. 562, 86th. Cong., 1st Sess. (1959) and H. R. Rep. No. 802, 86th. Cong., 1st Sess. (1959).

[357] S. Rep. No. 562 at 13. The Senate Committee specifically included a letter from the Department of Justice suggesting that Congress in amending section 315 should not abolish fairness obligations. Specifically, the Department of Justice stated that "care should be taken lest present requirements of fair treatment of public issues be weakened." The Department added that "under existing law, the Commission has held that a licensee's statutory obligation to serve the public interest includes the broad all-encompassing duty of providing a fair cross-section of opinion in the station's coverage of public affairs and other matters of controversy. This general fairness standard is presently applicable to political broadcasting not coming within the coverage of section 315." *Id.* at 19 (citations omitted).

existing statutory obligation to provide fairness in the coverage of controversial issues of public importance. This does demonstrate that the Senate was ambivalent, at least initially, as to whether the fairness doctrine was a Commission policy that was grounded in the statutory obligation of broadcasters to serve the public interest. It may also suggest that Senate concerns focused primarily upon the doctrine's role in ensuring fair coverage of candidates should the "news" exemption to Section 315 be enacted.

158. When the bill came up for debate in the Senate, a floor amendment was offered by Senator Proxmire. This amendment would have added to section 315 a new provision providing that:

> but nothing in this sentence shall be construed as changing the basic intent of Congress with respect to the provisions of this Act, which recognizes that television and radio frequencies are in the public domain, that the license to operate in such frequencies requires operation in the public interest, and that in newscasts, news interviews, news documentaries, on-the-spot coverage of news events, . . . all sides of public controversies shall be given as equal an opportunity to be heard as is practically possible.[358]

Upon a recommendation by Senator Pastore the phrase "as equal an opportunity" found in the last part of the Proxmire amendment was revised to read "as fair an opportunity."[359] Senator Pastore in offering this alternation explained that this new language "merely expresses the philosophy that the media of radio and television are in the public domain, and that they must render, under the law, public service, and that wherever it is practical and possible the situation must bring to light all sides of a controversy in the public interest . . . ."[360] While Senator Pastore had referred to the Proxmire amendment as "surplusage,"[361] he nonetheless stated that he understood "the amendment to be a statement or codification of the standards of fairness . . . " and that the Commission was "obliged by existing

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[358] 105 Cong. Rec. 14,457 (1959). Senator Proxmire in offering his amendment stated that the purpose of the amendment was to put into the Act the declaration made on page 13 of the Committee Report and thus a part of the statute make it binding. *Id.* While we believe the language found on page 13 of the Senate Committee Report, *supra* n.356, only sought to preserve the Commission's existing policy, the language proposed by Senator Proxmire appears to be more of an explicit codification of the fairness doctrine.

[359] *Id.*

[360] *Id.*

[361] Senator Pastore stated that he believed "we have already accomplished the purpose of the Senator's amendment. We have expressed it in the report." *Id.* at 14,457.

law and policy to abide by the standards of fairness."[362] Thus, it appears that at least some of the Senators viewed the Proxmire amendment as an attempt to codify the fairness doctrine.[363]

159. Unlike the Senate bill, the bill reported out of the House of Representatives dealt almost exclusively with correcting the situation brought about by the Commission's *Lar Daly* decision.[364] No specific amendment with respect to the general fairness doctrine was passed by the House of Representatives. The House members did, however, reject in a floor vote an amendment which would have required broadcasters to provide "equal opportunities" to opposing "representatives of any political or legislative philosoph[ies]."[365]

160. Because of differences in the bills reported out of the House of Representatives and Senate, the respective bills were sent to a House-Senate Conference.[366] Within this Conference, the language of the Proxmire Amendment was altered by the Conferees to its present form.[367] In the Conference Report[368] the Conferees, in referring to their inclusion of language which referenced the fairness doctrine, explained in a short statement that "there is nothing in this language which is inconsistent with the House substitute. It is a restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under

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[362] 105 Cong. Rec. at 14,462.

[363] There is still some doubt as to whether the Proxmire amendment if enacted would have codified the fairness doctrine in its entirety, especially in light of the fact that the majority of what little debate there was on the amendment centered on questions relating to fairness in the political broadcasting realm. *See Notice*, *supra* n.1 at ¶ 110.

[364] However, it should be noted that in the House Committee debates there is evidence that members believed that broadcasters were already subject to a statutorily required fairness obligation. For example, Representative Cellar stated that:

> broadcast licensees would continue to remain subject to their present statutory duty to operate in the public interest. Under this general, overall standard of licensee responsibility, the Commission requires a licensee to be fair in the presentation of opposing views on controversial public issues.

105 Cong. Rec. 16,227 (1959).

[365] Id. at 16,245.

[366] H.R. Rep. No. 1069, 86th Cong., 1st Sess. (1959). The non-inclusion of any fairness doctrine language in the House of Representatives was not the sole difference between the two bills.

[367] The United States Supreme Court in *Red Lion Broadcasting Co. v. FCC*, *supra* n.10 in dictum stated that the original Proxmire language "constituted a positive statement of doctrine and was altered to the present merely approving language in the conference committee." *Id.* at 383-84 (footnote omitted) *See* ¶ 166, *infra*.

[368] H.R. Rep. No. 1069, 86th Cong., 1st Sess. (1959).

the Communications Act of 1934."[369] Thus, there was no discussion in the Conference Report explaining why the Proxmire language was altered. Moreover, the Conference Report failed to explain whether the original intent of the Proxmire amendment had been retained in this new proviso. In this connection, we also note that the Conference Report explains that there was nothing in the language inconsistent with the House substitute. In light of the fact that the House bill did not contain any fairness language, the lack of a major discussion of the inclusion of fairness doctrine language suggests that this provision was not viewed as being controversial. However, we are not certain as to the reason this was not a controversial issue. In this regard, it appears that there are several plausible rationales for the lack of discussion on this provision in the Conference Report. First, it could be that Congress was merely making explicit what it already considered to be a statutory obligation under the public interest standard. Second, there is a possibility that because Congress was only preserving a Commission policy and not mandating its continuance there was no need for a discussion.[370] Further, if the provision was largely understood as intended only to ensure fair treatment of candidates in programming exempted from Section 315's equal opportunities provisions, there may have been general agreement that the proviso was desirable. Finally, it should be noted that, at the time, the fairness doctrine was enforced only at renewal, and some legislators believed it has little practical effect on licensees.[371]

161. In the post-Conference debates in both Houses, the Conferees in introducing the revised version of the bill made an effort to explain that the Proxmire amendment had been retained, at least in spirit. In particular, Representative Harris stated that:

> Now, just in case anybody in the broadcasting industry or in the Federal Communications Commission, or even a candidate himself, should get the idea that the reins are off; you can do what you want to, we have accepted in the Conference substitute a provision similar to what was referred to as the Proxmire amendment in the other body.[372]

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[369] *Id.* at 5.

[370] Parties, such as MAP/TRAC, have argued that this language proves that Congress intended to codify the fairness doctrine. *See* MAP/TRAC Comments, *supra* n.50 at 29–34. Other parties point out it is mere recognition of the Commission's policy pursuant to the public interest standard in the Act. *See* CBS Comments, *supra* n.83 at 111.

[371] *See Notice*, *supra* n.1 at ¶ 112.

[372] 105 Cong. Rec. 17,778 (1959). In addition, Representative Harris, stated that the Conferees "went further than that to be sure that there was no advantage taken by the broadcasting industry or anyone else and reaffirmed the 'standard

Likewise, in the Senate debates, Senator Pastore pointed out that "while the House conferees found some fault with the so-called Proxmire amendment, we insisted it be retained in the bill, if with some slight modifications, because it was the one condition we could write into the law to make sure the Federal Communications Commission would give the matter the right interpretation."[373]

162. These statements may lend some support for the proposition that a byproduct of the 1959 Amendments was a codification of the fairness doctrine. In the House of Representatives, however, the dialogue between Representatives Avery and Harris lends support to the contrary position that Congress intended solely to preserve the fairness doctrine. Specifically, Representative Avery questioned whether or not the "standard of fairness still prevails in the basic Act irrespective of any changes that were made in Section 315" and that "it applies not only to political candidates, but issues and editorializing by licensees as well."[374] In response, Representative Harris agreed that the standard remained and added that the conferees "discussed this particular item" and "agreed that the standard of fairness must prevail, and applies to the programs which will be exempted from the equal-time requirements of Section 315."[375] As demonstrated by these discussions, the majority of the debate on the fairness doctrine in both Houses centered around assuring that despite the new amendment the doctrine remained in the context of political broadcasting. This is understandable since the reason for Congress' action was overturning the *Lar Daly* decision.

163. While this appears to have been the focus of most of the debates, in the Senate at least one Senator believed that the fairness doctrine was being codified in its entirety. Specifically, Senator Scott pointed out that:

> [W]e have maintained very carefully the spirit of the Proxmire amendment, and I ought to point out . . . that the phrase "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance" does not refer merely to political discussions as such or to opposing views of political parties or of candidates. It is intended to encompass all legitimate areas of public importance which are

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of fairness' established under the Communications Act." *Id.*

[373] *Id.* at 17,830.

[374] *Id.* at 17,779.

[375] *Id.*

> controversial . . . and it is intended that no one point of view shall gain control over the airwaves to the exclusion of another point of view.[376]

Senator Case, however, did immediately afterwards endorse everything that Senator Scott stated and everything stated in the Conference Report.[377] None of the other Senators offered any remarks on the correctness of Senator Scott's statement.

164. We also found other statements in the legislative history which suggested that some members did believe that the fairness doctrine should not be a mandatory obligation. In particular, we note the statement of Representative Brown who expressed regret that the final bill "does not go quite as far as I would like toward giving freedom of information over the radido and television such as is enjoyed by the press of the Nation."[378] While there are a few statements throughout the legislative history discussing the fairness obligation, there is no evidence that clearly demonstrates an intent by Congress to codify the doctrine. Although as NBC observes "[t]he legislative discussion of the fairness doctrine cannot achieve what the statutory language fails to do,"[379] neither the statutory language nor the legislative history of section 315 provides a satisfactory answer to the question of congressional intent.

3. Judicial Interpretations of the 1959 Amendments.

165. As CBS points out the question of whether or not Congress has enacted the fairness doctrine as a statutory mandate has never been directly considered by any court.[380] In *Red Lion Broadcasting Co. v. FCC*,[381] the United States Supreme Court in upholding the personal attack and political editorializing rules did however provide dictum pertaining to the statutory implications of the 1959 Amendments to the Communications Act. Proponents and opponents alike have cited the *Red Lion* decision as supporting their respective positions concerning the statutory nature of the fairness doctrine. While the Court did examine the legislative history of Section 315, it failed to reach a clear conclusion as to whether the doctrine was codified. In this regard, we note that after citing the language at the end of

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376 *Id.* at 17,831.
377 *Id.* at 17,832.
378 *Id.* at 17,781.
379 "Reply Comments of National Broadcasting Company, Inc." at 21. [hereinafter cited as "NBC Reply Comments"].
380 *See* CBS Comments, *supra* n.86 at 124.
381 395 U.S. 367 (1969).

Section 315(a) the Court stated:

> [t]his language makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues.[382]

As proponents of the fairness doctrine contend this language suggests that the Court "viewed Congress' action as a codification of the FCC's interpretation that the fairness doctrine was an inextricable element of the 'public interest' section of the Act."[383] In addition, the *Red Lion* Court stated that "[h]ere, the Congress has not just kept its silence by refusing to overturn the administrative constructio, but has ratified it with positive legislation."[384]

166. Although this language implies that the *Red Lion* Court believed the 1959 amendments to be an explicit codification of the fairness doctrine, other language found in the decision just as equally suggests that it was only codified with respect to the political broadcasting realm or not at all. In particular, the Court stated that Congress "knowingly preserved the FCC's complementary efforts."[385] In this connection, we note that preservation of a Commission policy indicates that it is not a mandatory obligation of broadcasters and does not foreclose our discretion to later reevaluate that policy. Moreover, the Court in referring to the Proxmire amendment states that:

> [t]his amendment, which Senator Pastore, a manager of the bill and a ranking member of the Senate Committee, considered "rather surplusage," constituted a *positive statement of doctrine* and was altered to the present *merely approving language* in the Conference Committee.[386] (emphasis added).

Commenters who argue that the fairness doctrine is not statutory,

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[382] *Id.* at 380.

[383] MAP/TRAC Comments, *supra* n.50 at 35–36. This proposition is supported by the Court's subsequent statement that the congressional action in 1959 was a vindication of the "FCC's general view that the fairness doctrine inhered in the public interest standard." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 380.

[384] *Id.* at 381–82 (footnote omitted). The NTIA cites *Black's Law Dictionary* for the proposition that "[r]atification means the adoption of the act of another as one's own act, with the resulting responsibility for the consequences of that act." Reply Comments of the National Telecommunications and Information Administration" at 14 [hereinafter cited as "NTIA Reply Comments"]. In light of the subsequent statements made in the *Red Lion* decision, we are not certain what the Court reference to the doctrine having been ratified meant.

[385] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 385.

[386] *Id.* at 383–84 (citations omitted).

contend that this language proves that the Court viewed the proviso as not mandating, but merely endorsing the Commission's then existing policy.[387] For example, CBS contends that the Court's analysis in *Red Lion* "made clear that the doctrine was not being displaced by the exemptions to the equal time provisions, it did not deprive the Commission of the power later to determine that the public interest would be better served by the doctrine's rescission."[388]

167. Four years later the United States Supreme Court in *Columbia Broadcasting System v. Democratic National Committee*[389] also in dictum addressed the statutory implications of the 1959 Amendments to the Communications Act. However, the Court once again used ambiguous terminology in referring to the fairness doctrine. Therein, the Court stated that "[i]n 1959, Congress amended §315 of the Act to give *statutory approval* to the Fairness Doctrine."[390] Standing alone this language could suggest that the Court understood the 1959 amendments to codify the fairness doctrine. Contrarily, this same statement could stand for the proposition that Congress was recognizing and approving the doctrine, but not mandating its retention. Moreover, in the same footnote the Court while discussing Congress' enactment of § 312(a) states that "[t]his amendment essentially codified the Commission's prior interpretation of § 315(a) as requiring broadcasters to make time available to political candidates."[391] If the Court had meant to suggest that the fairness doctrine was codified, it could have stated that the fairness doctrine had been codified as it did in reference to § 312(a). We are not certain if the Court's choice of the term "statutory approval" was meant to suggest that the fairness doctrine is not statutory. Moreover, Justice William Brennan joined by Justice Thurgood Marshall in a dissenting statement determined that:

> The statutory authority of the Commission to promulgate this doctrine and related regulations derives from the mandate to the "Commission from time to time, as public convenience, interest, or necessity requires," to promulgate "such rules and regulations and prescribe such restrictions and

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[387] *See* RTNDA Comments, *supra* n.141 at 21.
[388] *See* CBS Comments, *supra* n.83 at 125 (footnote omitted).
[389] 412 U.S. 94 (1973). (The Court upheld the Commission's determination that the public interest would not be served by requiring broadcasters to accept editorial advertisements).
[390] *Id.* at 113 n.12 (emphasis added).
[391] *Id.*

> conditions . . . as may be necessary to carry out the provisions of [the Act] . . . "[392] (citations omitted)

That these Justices concluded that the "Fairness Doctrine was recognized and implicitly approved by Congress in the 1959 amendments to § 315 of the Act,"[393] suggests, as evidenced by the above statement, that they did not necessarily view it as having been mandated by section 315 of the Act. We have no evidence as to whether the other Justices agreed with this interpretation.

168. Because the United States Supreme Court so far has not given a definitive answer on whether or not the fairness doctrine has been explicitly codified into the Communications Act, we examined the cases in the United States Circuit Courts of Appeal. While some of these courts have, in passing, discussed the statutory nature of the fairness doctrine, none has specifically addressed in a reasoned decision the question of whether or not the fairness doctrine is codified. The Courts, which in dictum state that the fairness doctrine was codified in 1959, generally do not discuss the rationale behind their conclusions. Indeed, many of these Courts have adopted — without any discussion as to its correctness — the Commission's interpretation on whether or not the fairness doctrine was codified as part of the Communications Act.[394] Other Courts have relegated their discussion of the statutory nature of the fairness doctrine to a sentence or two in a footnote.[395]

169. At least one Court has specifically determined that the fairness doctrine has not been codified. The United States Circuit Court of Appeals for the First Circuit in *Public Interest Research Group v. FCC*[396] in upholding the Commission's determination that the fairness doctrine would only apply to commercial advertisement that spoke in an obvious and meaningful way to public issues stated, in dictum, that the "fairness doctrine is *not a*

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[392] *Id.* at 185 n.16. (Brennan, J., dissenting).

[393] *Id.* at 185 n.15. (citations omitted).

[394] *See, e.g., Green v. FCC*, 447 F.2d 323, 327 n.6 (D.C. Cir. 1971) (the Court cited the FCC's ruling *In re Obligations of Broadcast Licensees Under the Fairness Doctrine*, 23 FCC 2d 27, 28 (1970) and *Brandywine — Mainline Radio, Inc., v. FCC*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied* 412 U.S. 922 (1973) (The Court quoted the FCC's opinion in *Committee for the Fair Broadcasting of Controversial Issues*, 25 FCC 2d 283, 291 (1970). In this regard, we note that both of these Commission decisions cited by the courts found the fairness doctrine to have been codified in the 1959 Amendments.

[395] *See, e.g., Maier v. FCC*, 735 F.2d at 225 n.5 and *Banzhaf v. FCC*, 405 F.2d at 1095 n.49.

[396] 522 F.2d 1060 (1st Cir. 1975).

creature of statute but was evolved over the years by the Commission under the 'public interest' standard of the Communications Act."[397] Moreover, the Court declared that Congress only "acknowledged and generally endorsed the Commission's adoption of fairness standards."[398]

170. In *Straus Communications, Inc. v. FCC*,[399] the court found that the fairness doctrine "received explicit statutory recognition in the 1959 amendments."[400] The precise ramifications of Congress giving "statutory recognition" are unclear. Moreover, the Court made this statement without any substantive discussion indicating its meaning.

4. Commission Interpretations of the 1959 Amendments

171. Although some Courts have relied upon Commission interpretation of the fairness doctrine's statutory nature, the Commission itself has not steadfastly found the doctrine to have been codified. Over the years, the Commission has reassessed the implications of the 1959 amendments to the Communications Act. While some Commission decisions have without much discussion assumed that Congress codified the doctrine in 1959,[401] other Commission determinations have found that Congress only "ratif[ied] the Commission's then-existing policy concerning application of the Fairness Doctrine to news broadcasts."[402] And still other Commission decisions have been ambivalent on whether the

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[397] *Id.* at 1066 (emphasis added). Complainants in this case had specifically argued that the fairness doctrine was codified. However, the Court concluded that Congress had delegated under the general public interest standard the enforcement of the fairness doctrine.

[398] *Id.* (citations omitted).

[399] 530 F.2d 1001 (D.C. Cir. 1976).

[400] *Id.* at 1007 n.11. *See also American Security Council Education Foundation v. FCC*, 607 F.2d 438 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980). The District of Columbia Circuit Court of Appeals therein stated that "[i]n 1959, Congress confirmed the Commission's view that the fairness doctrine was part of the public interest standard" *Id.* at 443 n.12.

[401] *See Study of Fairness Doctrine*, 30 FCC 2d 26, 26-27 (1971) and *1974 Fairness Report*, *supra* n.3. It should be once again pointed out that the *1949 Fairness Report*, *supra* at n.6, found the doctrine to be statutory solely under the general public interest standard.

[402] *Report and Order* in BC Docket No. 81-741, FCC 83-120, 53 RR 2d 1309 (1983). *See also Notice of Proposed Rule Making* in MM Docket No. 83-331, FCC 83-130 (released May 25, 1983). (Commission stated that Fairness Doctrine was "statutorily approved" by Congress). We also note that then Chairman Richard E. Wiley in a separate statement to the reconsideration of the *1974 Fairness Report* concluded that "The literal wording of the statute indicates only that the Commission's fairness policies were left undisturbed. . . ." *Memorandum Opinion and Order on Reconsideration of the Fairness Report*, 58 FCC 2d at 700 (separate statement of Chairman Wiley).

doctrine was codified.[403] Thus, the Commission has never definitively concluded that the fairness doctrine was codified in 1959.

5. Subsequent Congressional Interpretations of the 1959 Amendments

172. Finally, we examined subsequent statements by Congress, including the statements of key figures in the 1959 amendment to section 315, to ascertain Congressional views on the statutory nature of the fairness doctrine. Once again we discovered there was evidence both supporting the codification proposition and opposing it. We begin with those statements suggesting that Congress in 1959 codified the fairness doctrine. In particular, Senator Pastore during congressional hearings in 1963 on further amending the equal time provision, implied that section 315 codified the fairness doctrine and that if there were any changes made to section 315, "there ought to be a restatement on the fairness doctrine."[404] Moreover, Senators Pastore and Proxmire in a 1975 hearing on bills to eliminate the fairness doctrine, gave their beliefs that the doctrine had been codified in 1959. Specifically, in his opening statement, Senator Proxmire explained that:

> Although the fairness doctrine dates back to 1949 in a sophisticated form, it was not until 1959 that it was recognized in the United States Code. I had a hand in putting it there.[405]

This conclusion was expanded upon by Senator Pastore who simply stated "we codified [the fairness doctrine] in 1959."[406]

173. There also exists subsequent legislative statements suggesting that even Congress itself was not certain whether the fairness doctrine has been codified.[407] In this connection, we note that in 1968, less than ten years after the amendments to section 315, a study of the legislative history of the fairness doctrine was prepared for the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce,[408]

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[403] *See Notice of Proposed Rule Making* in MM Docket No. 83-670, 94 FCC 2d 678, 706 n.50 (1983).

[404] *Equal Time: Hearings on S.251, S.252, S.1696, and H.J. Res. 247 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 88th. Cong., 1st Sess. 59 (1963). *See also* NTIA Comments, *supra* n.348 at 9.

[405] *Fairness Doctrine: Hearings on S.2, S. 608 and S.1178 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 94th. Cong., 1st. Sess. 13 (1975).

[406] *Id.*

[407] *See, e.g., Notice supra* n.1 at ¶ 111 n.157.

[408] *Manelli Report, supra* n.318.

(Manelli Report). The Manelli Report, after an exhaustive study of the legislative history, concluded that "the legislative history of the Communications Act with respect to the Fairness Doctrine does not establish whether the doctrine should properly be considered a part of the statute."[409] In addition, the Manelli Report contended that Congress "intended neither approval nor disapproval of it (fairness doctrine), but merely intended to ensure that Section 315 would not interfere with it."[410] The Senate also issued a staff study in 1968 which determined that "Section 315 is a congressional enactment and the 'fairness doctrine,' although a qualifying reference to it apears in section 315, is not."[411] However, it did find that the "public interest, convenience, and necessity, requires each broadcast licensee to devote a reasonable percentage of his broadcast time to the presentation of programs dealing with issues of interest in the community served by the particular station."[412]

174. As demonstrated by the conflicting evidence found in the record, reaching a conclusion as to whether or not Congress has mandated our retention of the fairness doctrine is a difficult determination. We believe it unnecessary, however, to reach a definitive conclusion on this matter given our determination to defer action concerning the fairness doctrine pending review by Congress of the record compiled in this proceeding.

VI. Conclusion

175. Based on the voluminous record compiled in this proceeding, our experience in administering the doctrine and our general expertise in broadcast regulation policy determinations, we believe that as a policy matter the fairness doctrine no longer serves the public interest. Moreover, the development of the information services marketplace makes unnecessary any governmentally imposed obligation to provide balanced coverage of controversial issues of public importance. Furthermore, we have found that far from serving its intended purpose, the doctrine has a chilling effect on broadcaster's speech. Accordingly, we have questioned the permissibility of the doctrine as a matter of both policy and constitutional law.

176. Notwithstanding these conclusions, we have decided not to

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[409] *Id.* at 28.
[410] *Id.* at 29.
[411] *Staff Report of the Senate Committee on Commerce*, 90th. Cong., 2d Sess. 4 (Comm. Print. 1968).
[412] *Id.*

eliminate the fairness doctrine at this time. The doctrine has been a longstanding administrative policy and a central tenet of broadcast regulation in which Congress has shown a strong although often ambivalent interest. Indeed, while Congress has not yet chosen to eliminate the doctrine legislatively, several members of Congress have recently sponsored bills seeking to abolish the fairness doctrine and its related policies.[413] Congress also has held hearings to determine whether or not it should enact legislation to eliminate the doctrine.[414] In addition, we recognize that the United States Supreme Court in *FCC v. League of Women Voters of California*[415] has similarly demonstrated an interest in our examination of the constitutional and policy implications underlying the fairness doctrine. Because of the intense Congressional interest in the fairness doctrine and the pendency of legislative proposals, we have determined that it would be inappropriate at this time to eliminate the fairness doctrine. Given our decision to defer to Congress on this matter, we also believe that it would be inappropriate for us to act on the various proposals to modify or restrict the scope of the fairness doctrine. It is also important to emphasize that we will continue to administer and enforce the fairness doctrine obligations of broadcasters and to underscore our expectation that broadcast licensees will continue to satisfy these requirements.

177. Accordingly, IT IS ORDERED, THAT this proceeding IS TERMINATED.

178. IT IS FURTHER ORDERED, THAT the motions requesting acceptance of late-filed pleadings ARE GRANTED.

179. IT IS FURTHER ORDERED, THAT the "Application for Review" filed by the Media Access Project is DENIED.

180. IT IS FURTHER ORDERED, THAT the Secretary SHALL CAUSE this *Report* to be printed in the Federal Communications Commission Reports.

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[413] *See, e.g.*, S.1038, 99th Cong., 1st Sess. (1985); S. 22, 99th Cong., 1st Sess. (1985); H.R. 5585, 97th Cong., 2d Sess. (1982); and S. 22, 98th Cong., 1st Sess. (1983).

[414] *See, e.g., Freedom of Expression Act of 1983: Hearings on S.1917 Before the Committee on Commerce, Science, and Transportation*, 98th Cong., 2d Sess. (1984). Senator Bob Packwood also requested that a staff report prepared by the National Telecommunications and Information Administration be printed for use by the Senate Committee on Commerce, Science, and Transportation. *Print and Electronic Media: The Case for First Amendment Parity Printed at the Direction of Senator Bob Packwood for the Committee on Commerce, Science, and Transportation*, 98th Cong., 1st Sess. (1983). This study examined in detail whether there should be first amendment parity between the print and electronic media.

[415] 104 S.Ct. 3106 (1984). *See* ¶ *15, supra.*

181. IT IS FURTHER ORDERED, THAT the Secretary SHALL FORWARD copies of this *Report* to the appropriate Committees and Subcommittees of the House of Representatives and the Senate.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix

*Parties Submitting Formal Comments in Gen. Docket No. 84-282**

Accuracy in Media

American Advertising Foundation

American Association of Advertising Agencies

American Broadcasting Co. ("ABC")

American Cancer Society

American Civil Liberties Union ("ACLU")

American Heart Association

American Jewish Committee

American Jewish Congress

American Legal Foundation ("ALF")

American Newspaper Publishers Association

Antidefamation League of the B'nai B'rith

Arizona Television Co.

Ashville Musicians and Artists for a Sane Environment

Association of National Advertisers

Black Citizens for a Fair Media/Citizens Communications Center/League of United Latin American Citizens/National Association of Better Broadcasting

*For purposes of compiling this list of parties filing comments and reply comments, a filing was considered "formal" if it included the correct docket number and the proper number of copies were submitted.

("BCFM et. al.")

CBS, Inc. ("CBS")

Committee for Community Access

Common Cause

Democratic National Committee

Eagle Forum

Elba Development Corp/Multimedia, Inc. and Providence Journal Co.

Forward Communications Co., *et al.*

Foundation for the Arts of Peace

Freedom of Expression Foundation ("FEF")

General Motors/International Paper Co./Campbell Ewald Co. ("General Motors *et al.*")

Henry Geller/Donna Lampert

Glass Packaging Institute

Robert C. Greene

KGRL 940 (Gary Capps)

KIPR 95.FM

KMAN (B. Thornton)

Pamela Magasich

Maine Nuclear Referendum Committee

Luther Martin

Media Action Project Telecommunications Research and Action Center ("MAP/TRAC")

Meredith Corp.

Midwest Family Group

Mobil Corp.

National Association of Broadcaster ("NAB")

National Broadcasting Co. ("NBC")

National Cable Television Association

National League of Cities

National Radio Broadcasters Association

National Rifle Association of American

National Telecommunications and Information Administration ("NTIA")

People for the American Way

Post-Newsweek

Public Broadcasting Service and National Association of Public Television

Stations
Public Media Center
Radio Television News Director Association
Society of Professional Journalists
Tribune Broadcasting Co.
United States Catholic Conference
Office of Communications of the United Church of Christ
Westinghouse Broadcasting and Cable ("Group W")
Yes to Stop Calloway Committee

Parties Submitting Formal Reply Comments

Actors Equity Guild *et. al.*
American Arab Anti-Discrimination Committee
ABC
ACLU
American Federation of Labor and Congress of Industrial Organizations
ALF
Authors League of American
Byron Bailer
Toni Bean
BCFM, *et al.*
Eric Buchanan
Deborah Bynum
Laura Byrd
CBS
Center for Science in the Public Interest
Sharon Chambers
Choosing Our Future
Committee for Responsible Investment, Medical Mission Sisters
Department for Professional Employees, AFL-CIO
Ecumedia
Donise Edwards
Janis Ernst
Cheryl N. Freeman
FEF
Alyce F. Gaither
Henry Geller/Donna Lampert

General Motors *et al.*

Sidney Hall

John Harvey Kentucky Fair Tax Coalition

Catherine LaMarr

Andrew Lee

Mark Loud

Shari Mauney

MAP/TRAC

NAB

National Bar Association/National Association for the Advancement of Colored People

NBC

National Coalition to Ban Handguns

NTIA

Kay Pierson

Robert Rivers

Rhonda Rhea

Rosemary Ryan, M.D. *et al.*

Safe Energy Alliance of Alabama

Jennifer Small

United States Catholic Conference

United States Public Interest and Research Group

Telecommunications Research and Action Center

Cheryl Thompson

Laurie Washington

Group W

Yvette Williams

August 7, 1985

STATEMENT OF MARK S. FOWLER, CHAIRMAN

Re: Fairness Doctrine Report

250 years ago this week, a publisher named John Peter Zenger was on trial. Zenger ran the Weekly Journal, a New York paper that had reprinted the letters of two Whig journalists who had argued in their essays for freedom of the press, that "freedom of speech is ever the symptom as well as the effect of good government." For this, and for being a critic of the British authorities, Zenger had been charged with seditious libel by the

Governor General of New York. He spent almost a year in jail awaiting trial. Although he was surely guilty under the prevailing laws at the time, the jury acquitted Zenger.

The lessons of the Zenger trial have never been lost on the United States, nor on this Commission. Today's report is linked to this country's tradition of people to criticize their government without recrimination or licensing.

Justice William O. Douglas foreshadowed this viewpoint in his own repudiation of the Fairness Doctrine 12 years ago. He said: "The Court . . . by endorsing the Fairness Doctrine sanctions a federal saddle on broadcast licensees that is agreeable to the traditions of nations that never have known freedom of press and that is tolerable in countries that do not have a written constitution containing prohibitions as absolute as those in the First Amendment."[1]

This very week the British Broadcasting Corporation experienced a walk-out of its journalists. They did not strike over wages or seniority, but over the matter that concerns us today: their freedom of the broadcast press to cover a controversial issue of public importance in the manner they saw fit. Justice Douglas was right: there is a difference amongst the nations of this world that have a constitutional protection against restraints on press and those that, unhappily, do not.

So it is freedom, then, that is at the heart of this exemplary example of draftsmanship from the Mass Media Bureau. I have made the advancement of First Amendment rights an uppermost objective of my Chairmanship. I feel pride and satisfaction that we have a report that comprehensively reviews the operation and context of the Fairness Doctrine and considers the comments of all those who participated in our proceeding. It responds to the arguments of proponents and opponents of the Fairness Doctrine in a scholarly and responsible manner.

Today's report is an indictment of a misguided government policy. It is a recital of its shortcomings, both legal and practical. The First Amendment dictates: Choose between the right of the press to criticize freely and the authority of the government to channel that criticism. Today's order is a statement by this Commission that we should reverse course, and head ballistically toward liberty of the press for radio and television. Free speech and free government thrive together or they fail together. John

[1] Columbia Broadcast System v. Democratic Nat'l Comm., 412 U.S. 94, 817-18 (1973) (concurring opinion).

Peter Zenger said that. William O. Douglas said that. And today, so do we.

August 7, 1985

Concurring Statement of FCC Commissioner James H. Quello

In re: Inquiry into the General Fairness Doctrine Obligations of Broadcast Licensees.

This *Report* contains a very well reasoned and persuasive indictment of the fairness doctrine. It presents conclusive evidence that the doctrine is unnecessary and that it does not further its purpose of encouraging the presentation of controversial issues of public importance. The *Report* strongly documents its ultimate conclusion that the fairness doctrine does not serve the public interest, and I fully support that conclusion.

I wish to emphasize, however, my determination that this record compels the conclusion that Congress intended to codify the fairness doctrine as part of the 1959 amendments to the Communications Act.[1] The Commission has long acquiesced in the view that the fairness doctrine was codified by these amendments,[2] and, thus, the burden of proof must rest with those who would urge that the agency itself has authority to eliminate the doctrine. In my view, nothing in the record contradicts the clear language of section 315(a) which states that licensees have an "obligation imposed upon them under [the Communications Act] to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[3]

Since I believe that the doctrine has been codified, I concur in the decision to defer to Congress on this matter.

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[1] *See* Act of September 14, 1959, Pub. L. No. 86-274, § 1, 73 Stat. 557 (amending 47 U.S.C. § 315(a) (1952)).

[2] *See, e.g., Fairness Report*, 48 F.C.C.2d 1, 1 (1974).

[3] 47 U.S.C. § 315(a) (1984).

Application, Amendment of, Change of Ownership
Application, Amendment of, Effect on Pending Application
Application, Amendment of, Substantial Change
Change, Major
Ownership Changes

Review Board reversed ALJ's return of application to processing line as result of an amendment showing a change in ownership. Under Sec. 73.357(b) (as amended), changes in ownership interests do not constitute "major" changes unless they result in the original parties to the application retaining 50% or less of the ownership interests.
—International B/c Consultants, Inc.
MM Docket No. 84-157

FCC 85R-73

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
International Broadcast Consultants, Inc. Gardnerville, Nevada	MM Docket No. 84-157 File No. BP-811015AJ
Alegria I, Inc. Marina, California	MM Docket No. 84-159 File No. BP-811015AJ
Elizabeth Waters, Phyllis Moore, Gloria McKinley and Verna Rolls, d/b/a Heritage Communications Yountville, California	MM Docket No. 84-160 File No. BP-811015AK
For Construction Permit for a New AM Station	

MEMORANDUM OPINION AND ORDER

Released: September 4, 1985

BY THE REVIEW BOARD:

1. On July 31, 1985, Alegria I, Inc., appealed a *Memorandum Opinion and Order*, FCC 85M-2915, released July 24, 1985, ordering that Alegria's application be returned to the processing line. An opposition to the appeal was filed on August 8, 1985, by Heritage Communications. We grant the appeal for the reasons set out below.

2. The ALJ's order resulted from a petition to dismiss filed by Heritage asserting that Alegria's application had been amended so that there had been a substantial change of ownership, and that consequently it should be sent back to the processing line and assigned a new file number. The ownership of Alegria's voting stock has been rearranged a number of times during the pendency of its application. The statements of voting stock ownership, as of the pertinent filing dates, are as follows:

	10/15/81 Application	*12/27/82 "B" cut-off*	*9/23/83 Amendment*	*1/2/85 Amendment*
Joseph L. Corpuz	26%	37.5%	25%	3%
Hugh J. MacPherson	8	37.5	25	25
Theresa Perez	—	15	10	10
Gilbert J. Solano, Sr.	26	—	—	—
Felix T. Solano	—	5	3.33	3.5
Consuelo R. Rodriguez	—	5	3.33	3.5
Richard A. Bowers	20	—	16.67	27.5
Thomas D. Muller	20	—	16.67	27.5

In addition, the December 27, 1982, and September 23, 1983, amendments stated that Muller and Bowers each owned 50% of

the outstanding preferred, non-voting stock; the January 2, 1985, amendment showed that they each owned 34.75% of such stock. Furthermore, in its September, 1983 amendment, Alegria stated that it was thereby correcting the ownership interests indicated in the December 27, 1982, "B" cut-off amendment, which Alegria stated were erroneous. *See Hearing Designation Order*, released February 29, 1984, at n.3, which accepted the corrective amendment. All of the amendments except the one in January, 1985, were submitted before this proceeding was designated for hearing.

3. Heritage argued below, and argues again on appeal, that Messrs. Bowers and Muller together went from owning no voting stock of Alegria at the "B" cut-off date to owning 55% after the most recent amendment. Therefore, the combined effect of the September, 1983 and January, 1985 amendments was to transfer a controlling interest in Alegria to Bowers and Muller from those who had control before these amendments. Heritage asserts that if a construction permit had been granted prior to the September, 1983 amendment, it would have been necessary for Alegria to file an application for consent to transfer of control on FCC Form 315 and obtain Commission approval before the most recent amendment could be effectuated. The ALJ accepted Heritage's analysis, stating that what was at issue was whether control of the ownership had changed hands since the "B" cut-off date. He found that control of Alegria was in different hands after the most recent amendment than at the "B" cut-off date. He therefore found that there had been a major change in Alegria's application under Section 73.3571(b) of the Commission's Rules, 47 CFR § 3571(b), and he ordered it returned to the processing line.

4. Until recently the rule provisions governing major ownership changes in pending applications were tied to the rule provisions governing assignments and transfers of control. However, in *Processing of Broadcasting Applications*, 56 RR 2d 941 (1984), the Commission modified Section 73.3571(b) (and the corresponding operative provision, Section 73.3571(j)(2)), effective July 1, 1984. Under the modified provisions, an ownership change in an applicant constitutes a major change requiring the assignment of a new file number (and hence return to the processing line) only if the amendment "result(s) in a situation where the original party or parties to the application do not retain more than 50% ownership interest in the application as originally filed." Both the language of the rule provisions themselves and the language the

Commission used in adopting it, *see* 56 RR 2d at 945, establish that a minority interest party may become a majority interest party without engaging in a major change so long as the party or parties to the application at the time of original filing retain more than 50% of the ownership interests. As is evident from the table in paragraph 2 above, the original parties to Alegria's application have at all times retained more than 50% of its ownership interests. Consequently, there has been no major change which would require the assignment of a new file number and a return to the processing line.

5. Our ruling only considers the effect of the changes in ownership interests as regards a return of the application to the processing line and the assignment of a new file number. It involves no consideration of the effect the various changes in Alegria's ownership may have on the evaluation of its comparative qualifications, and the traditional rule against "upgrading." Thus, while the ALJ and Heritage have focused on changes occurring since the "B" cut-off date, we point out that this date is pertinent to the issue of comparative upgrading, but under the recent modification of Section 73.3571 does not bear upon the question of whether a major change has transpired. In any case, in view of the Commission's acceptance of Alegria's corrective amendment in the *Hearing Designation Order*, see para. 2, above, Heritage's contention that Bowers and Muller owned no voting stock in the period after the December, 1982 amendment is incorrect.

6. ACCORDINGLY, IT IS ORDERED, That the Appeal From Presiding Officer's Ruling, filed July 31, 1985, by Alegria I. Inc., IS GRANTED, and that its application (File No. BP-811015AJ) IS REINSTATED in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

Amateur Radio Service
License, Revocation

Amateur station license revoked and operator license suspended for term where licensee was found to have caused willful and malicious interference to other amateur operators by transmission of music over his radio system.

— *James W. Smith*

PR Docket No. 84-774

FCC 85R-77

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Revocation of License of	
James W. Smith P.O. Box 2279 El Cajon, California 92021	PR Docket No 84-774 File No. PR-2943
Licensee of Station W6VCE in the Amateur Radio Service	
Suspension of License of	
James W. Smith P.O. Box 2279 El Cajon, California 92021	PR Docket No. 84-775
Amateur Advanced Class Operator License	

Appearances

Howard R. Harris on behalf of James W. Smith; and *Carol Fox Foelak* on behalf of the Chief, Private Radio Bureau, Federal Communications Commission.

DECISION

Adopted: September 19, 1985; Released: September 24, 1985

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD CHAIRMAN MARINO:

1. This case was designated for hearing to determine whether James W. Smith's license for Amateur radio station W6VCE should be revoked and his Amateur operator license suspended on the basis of allegations that Smith violated Commission rules pertaining to willful and malicious interference (Section 97.125), failure to identify (Sections 97.84(a) and 97.123), broadcasting (Section 97.113), and transmission of music (Section 97.115). In a thorough 23 page Initial Decision (FCC 85D-21, released March 29, 1985), Chief Administrative Law Judge Fitzpatrick concluded that Smith violated each of the cited rules and that these infractions mandated the revocation of his station license and suspension of his operator license. Specifically, the findings established that on February 19, 1984, Smith, without identifying his station, transmitted country and western and easy listening music over his radio station, thereby willfully and maliciously causing interference to other amateur operators. Smith filed an appeal (exceptions) to the I.D., and the Bureau filed a brief in support of the I.D., as well as a reply to Smith's appeal. We have reviewed the I.D. in light of these pleadings and our examination of the record, and hereby adopt the Chief ALJ's findings and conclusions and affirm his ultimate judgment calling for revocation and suspension of Smith's licenses.

2. Smith's appeal largely reargues matters thoroughly considered and correctly resolved in the I.D. and therefore requires only brief comment. Thus, Smith denies culpability by claiming that he lacked the technical equipment necessary to access the repeater frequency on which the music was heard. Br. at 5. This denial, however, is outweighed by substantial evidnece in the record which identified Smith as the source of the interference. Specifically, after receiving a complaint about interference from an Amateur licensee in the area, William H. Grigsby, who is Engineer in Charge of the FCC San Diego Office, monitored the frequency in question, and by use of sophisticated direction finding equipment, traced the source of the music interference to Smith's residence several times on the evening of February 19, 1984. I.D., Findings, paras. 33-39. The use of direction finding

equipment by Commission engineers has been traditionally accepted as a valid means of establishing the source of objectionable interference. *See Harold R. Claypoole*, 95 FCC 2d 331 (1983); *Donald E. Gilbeau*, 91 FCC 2d 98 (Rev. Bd. 1982). Although Smith raises several technical objections to conclusions based on Grigsby's testimony, Br. 3-4, we agree with the Bureau that these objections are based purely on hypothetical speculation and surmise, rather than evidence. *See* Bureau Br. at 5-6; I.D. Findings, paras. 40-41.

3. Smith also complains that Grigsby's testimony was unreliable because the engineer was prejudiced against him, Br. at 6; however, this allegation was explored by the Chief ALJ and likewise correctly rejected by him because it was not supported by the record which confirmed Grigsby's extensive experience in the use of direction finding equipment but provided no indication that he bore any bias against Smith. *See* I.D., Findings, paras. 53-55; Conclusions, para. 8; tr. 187, 205. Finally, Smith contends that he has been the victim of harassment from others in the San Diego amateur radio community. Br. at 11-13. The record establishes that for years there had been a pattern of name-calling, harranguing, and harassment in the San Diego amateur radio community, and that harassment of Smith was purpurtedly in retaliation for his jamming activities on the repeater networks. I.D., Findings, paras. 6-11, Conclusions, para. 8. While this situation is of course regrettable, it does not excuse or justify Smith's willful and deliberate interference with other radio communications as established on this record. *See Raymond C. Standring*, 68 FCC 2d 1021 (1978); *Henry C. Armstrong, III*, 92 FCC 2d 485 (Rev. Bd. 1983); *Johnathan M. McFadden*, 75 FCC 2d 212 (Rev. Bd. 1979). The I.D. is therefore affirmed.*

4. ACCORDINGLY, IT IS ORDERED, that the license of James W. Smith for Station W6VCE in the Amateur Radio Service IS REVOKED, and his Amateur advanced class operator license IS SUSPENDED for the remainder of the license term.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review board*

* Smith's request (Br. at 14) to submit additional evidence allegedly bearing on his amateur activities is rejected because he does not even attempt to meet the stringent test for reopening a hearing record. *See KFPW Broadcasting Co.*, 44 FCC 2d 310 (1973).

NOTE: Pursuant to Section 1.104 of the Rules, 47 CFR § 1.104, the revocation and suspension ordered herein become effective 40 days after the release date of this Decision, unless an application for review or petition for reconsideration is filed within 30 days, in which case the effective date will be suspended pending further order of the Board or Commission. Immediately upon the effective date of this Decision, the licensee shall forward to the Commission the licenses revoked and suspended. Operation of the Amateur radio station herein after the effective date will be in violation of Section 301 of the Communications Act of 1934, as amended, and will subject any person in violation to the penal sanctions specified in Section 501 of the Communications Act. A copy of this Decision shall be served by Certified Mail, Return Receipt Requested, on James W. Smith at his last known address, P.O. Box 2279, El Cajon, California.

FCC 85D-21

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Revocation of License of James W. Smith P.O. Box 2279 El Cajon, California 92021 Licensee of Station W6VCE in the Amateur Radio Service	PR Docket No. 84-774 File No. PR-2943
Suspension of License of James W. Smith P.O. Box 2279 El Cajon, California 92021 Amateur Advanced Class Operator License	PR Docket No. 84-775

Appearances

Howard R. Harris on behalf of James W. Smith; and *Carol Fox Foelak* on behalf of the Chief, Private Radio Bureau, Federal Communications Commission.

Initial Decision of
Chief Administrative Law Judge Thomas B. Fitzpatrick

Issued: March 25, 1985; Released: March 29, 1985

Preliminary Statement

1. James W. Smith (Smith) is the licensee of Amateur radio

station W6VCE, located at 2610 El Tinge Drive, Alpine, California, and holds an Advanced Class Amateur radio operator license. His current licenses were granted on October 27, 1981 for a five-year term.

2. On April 18, 1984, the Chief, Private Radio Bureau (Bureau), acting pursuant to deligated authority, issued an *Order to Show Cause and Suspension Order (Order)* directing Smith to show cause why his license for Station W6VCE should not be revoked and suspending his Advanced Class Amateur radio operator license for the remainder of its term. It was alleged (par. 2 of *Order*) that Smith's Amateur radio station on February 19, 1984, made unidentified transmissions on the frequency 147.99 MHz "which apparently caused malicious interference" to the communications of stations using the "DR0NK" repeater system. It was also alleged that Smith's station transmitted "an unidentified buzzing noise" on the frequencey 146.64 MHz.[1]

3. The *Order* specified the following issues:

> (a) To determine whether [Smith] willfully and/or repeatedly violated Sections 97.125 (willful and malicious interference); 97.84(a) and 97.123 (failure to identify); 97.113 (broadcast); and/or 97.115 (transmission of music) of the Commission's Rules on February 19, 1984.
>
> (b) To determine in light of the above issue whether [Smith is] qualified to remain an Amateur radio station licensee.
>
> (c) To determine whether [Smith's] license for Amateur radio station W6VCE should be revoked.
>
> (d) To determine whether the suspension of [Smith's] Amateur radio operators license should be affirmed, modified or dismissed.

4. By letter dated July 16, 1984, counsel for Smith denied the allegations and requested a hearing in the revocation and suspension proceedings. Because of this request, the suspension of Smith's Advanced Class Amateur radio operator license was held in abeyance, pursuant to Section 1.85 of the Commission's Rules, 47 C.F.R. 1.85, pending the outcome of this proceeding.

5. The prehearing conference was held on December 5, 1984, and the hearing was held on December 5 and 6, 1984 in San Diego, California. The record was closed at the conclusion of the hearing on December 6, 1984. The Bureau and Smith filed Proposed Findings of Fact and Conclusions of Law on February 1

[1] Bureau Counsel identified the buzzing noise as having occurred at 7:57 p.m., on February 19, 1984 (PRB Ex. 7, p. 11; Tr. 5).

and 4, 1985, respectively. The Bureau filed its Reply on February 11, 1985 and Smith's Reply was filed on February 15, 1985.

Findings of Fact

A. The Long-Standing Antagonism Between Smith and Other Amateurs

6. James W. Smith, (Smith), the licensee, is retired. He owns a company called "Mountain Relay Company". This consists of three mountain tops in San Diego County which he rents to government agencies, private businesses and some radio stations (Tr. 20). These are used for land mobile communications for these various agencies or businesses (Tr. 20, 21).

7. For some years, there has been a pattern of name calling, haranguing and harassment in the San Diego amateur radio community. One amateur, James Allen, described it as "about the most disgusting situation" he had ever encountered (Tr. 252-53). Allen claimed that this situation was the result of Smith's amateur operations in either baiting people to these activites or doing them himself (Tr. 253).

8. James Allen, Thomas W. Goldrich, Jr., Stuart M. Hacken and Jerry Gastil, amateur licensees, characterized Smith's amateur operations in the San Diego area as notorious (Tr. 231-34, 239-40, 252-53, 255-56, 273). Gastil, the trustee, or licensee, of the DR0NK repeaters, related that Smith has generally tried to make life miserable for them (Tr. 224, 232; PRB Ex. 8, p. 1). Gastil has the bumper sticker on his car with a slash through "VCE," Smith's call sign, to show that he does not care for Smith's type of operation (Tr. 232). Allen has publicly expressed his objections to Smith's operating practices (Tr. 240). When Allen ran for secretary of the San Diego Repeater Association (SANDRA) in early 1982, his platform was that a vote for him was a repudiation of Smith and everything he stood for (Tr. 242). He explained that at that time, 1982, conditions on the SANDRA Mt. Otay repeater were disgusting, with the worst kind of language and name calling (Tr. 252-53).

9. Smith, acknowledging that he had done "stupid things," described the harassment that he had suffered at the hands of other amateurs who were members of the SANDRA network[2] (Tr. 450-53, 455-56). Smith has been harassed, both on and off the

[2] The SANDRA network was a round-table discussion of amateurs, held at 8:00 p.m. on Sundays and operating on the SANDRA repeater (Tr. 134-36, 197).

airwaves (Tr. 450-56). A plywood board in the form of a tombstone, with his call sign, was placed in his front yard in October 1983, and a eulogy was played on the radio[3] (Tr. 450-52, 453-54; Smith Ex. 7). A false application was submitted to this Commission in his name for a change of call sign (Tr. 445-46; Smith Exs. 8-10). Smith has been the victim of harassment on the air, as exemplified by statements such as "up yours, Jimmy" and coarse and insulting statements concerning his daughter (Tr. 455-56). Smith has received threats to his life over the telephone and a hearse was sent to his home[4] (Tr. 455, 468). Lastly, "Jimmy tapes" were played on the radio[5] (Tr. 26, 470-71).

10. Smith acknowledged that his response to this harassment has been to retaliate (Tr. 456-57).

11. Smith's reaction was to "go one deck underneath the comments." For instance, when he was called a liar,[6] he replied: "Yes, I was knighted Sir Lie-a-Lot." He was referred to himself as "Alpine Jammer No. 2" (Tr. 457). Smith acknowledged that he got so upset and so drunk that he didn't know "what the hell happened" (Tr. 457). He characterized himself as a "stupid Irishman" who wants to fight and who doesn't "run away from things" (Tr. 457). The Presiding Judge closely observed Smith while he was testifying, and concluded that he is an individual with a trigger-sharp temper who, in the parlance of the streets, wouldn't "take any nonsense from anybody" and would "go down swinging."[7]

B. Complaints Re Smith's Amateur Operations

12. The Commission's San Diego Field Office had received complaints concerning Smith's Amateur operations and had conducted monitoring to investigate such complaints at least as far back as 1980[8] (Tr. 195-96, 200). More recently, in September

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[3] All references to "radio" are to operation on the amateur radio frequencies.

[4] Bumper stickers were distributed with Smith's call sign VCE with a line through it (Smith Ex. 11). Allen, who distributed the stickers, has one on his car. He explained that the DR0NK net operators do not want Smith operating through their repeater system (Tr. 231-34).

[5] "Jimmy tapes" are tapes made by unknown persons of Smith's transmissions and later played over the air (Tr. 255, 469).

[6] It was a hobby with certain persons to get Smith to give intemperate responses (Tr. 254).

[7] Smith has heard tapes later that indicated he had said and done things that he wished he had not said and done (Tr. 469).

[8] These earlier monitoring operations were not part of an open case on Smith (Tr. 195, 201). No official Notices of Violations were issued as a result of these monitorings. The first Notice issued to Smith was as a result of Grigsby's

1983, William H. Grigsby (Grigsby), Engineer in Charge of the San Diego Office, had received complaints that Smith had been disrupting the Sunday night net on the SANDRA repeater[9] (Tr. 197).

C. February 5, 1984 - Smith's Threat To the DR0NK Repeater System

13. Because of these complaints that Smith had been engaged in jamming, Grigsby drove to Smith's neighborhood in Alpine, California in the Commission monitoring vehicle on the evening of Sunday, February 5, 1984 (Tr. 134, 197). While monitoring 147.99 MHz, the DR0NK repeater frequency,[10] Grigsby, at 8:40 p.m., heard Smith say: "This is W6VCE and I want to let you know, you bastards keep fucking with me and you aren't going to have a radio system any more. That's the way it's going to go down, W6VCE Alpine on 147.99"[11] (Tr. 138-39; PRB Ex. 6, p. 5).

14. It was stipulated that it was Smith's voice which was monitored and recorded by Grigsby on February 5, 1984 (Tr. 96-97). However, Smith recalled that he was at the Alpine Inn restaurant between 7:00 p.m. and 9:00 p.m. on February 5, 1984 and not at his residence. He did not recall making any radio transmissions that evening (Tr. 22-24). Smith denied that he made the statement on February 5, 9184; however, he acknowledged that it was his voice and speculated that it was a "Jimmy tape"[12] (Tr. 25-26).

D. The Operation of the DR0NK and SANDRA Repeater Systems

15. It is appropriate, before setting forth findings as to what happened on February 19, 1984, to explain the operation of the DR0NK and SANDRA repeater systems. A repeater station

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February 19, 1984 monitoring (Tr. 195). Grigsby opened a major case file on Smith in March 1984 (Tr. 199-201).

[9] As noted, *supra*, this net, a round-table discussion of amateurs, is held at 8:00 p.m. on Sundays (Tr. 134-36).

[10] The DR0NK repeater operation is described, *infra*. Grigsby, by a pinpoint direction finder (DF), satisfied himself that the transmission was coming from Smith's home, 2610 El Tinge Drive (Tr. 137-39). He also recognized Smith's voice, with which he was familiar (Tr. 136-38).

[11] PRB Exhibit 6, page 5, was received in evidence to establish Smith's state of mind and pattern of conduct (Tr. 26, 140-41).

[12] As explained, *supra*, "Jimmy tapes" were made by unknown persons of Smith's transmissions and later played over the air (Tr. 255, 469).

receives a signal on its input frequency and retransmits the same signal on its output frequency. Its purpose is to increase the range of the user's communications. Repeaters are generally established at an elevated location so that amateur operators using the repeaters may use low power, hand-held walkie-talkies or transmitters installed in their cars and operated from a lower elevation (Tr. 54-55; PRB Ex. 8).

(1) The SANDRA Repeater

16. The San Diego Repeater Association (SANDRA) has established a repeater on the frequencies 146.04 MHz (input) and 146.64 MHz (output). Hence, it is known as the "04/64" repeater (Tr. 106-07, 1345). It is located on Mt. Otay, which is some miles southeast of San Diego (Tr. 144; PRB Ex. 8, p. 1).

(2) The DR0NK Repeaters

17. The DR0NK Radio Network consists of five Amateur repeaters as following sites in Southern California: Mt. Otay, Mt. Laguna, Mt. Woodson, Running Springs and Tujunga[13] (PRB Ex. 8, par. 2).

18. The repeaters in the DR0NK Radio Network are more complex than the ordinary repeaters. All repeaters in the system receive on the frequency 147.390 MHz and receive and transmit on the frequency 147.990 MHz. These are "2 meter" VHF frequencies. Each repeater is also equipped with a set of UHF[14] frequencies as follows: Mt. Otay-444.625 MHz (input) and 449.625 MHz (output); Mt. Laguna-444.025 MHz (input) and 449.025 MHz (output); Mt. Woodson-444.775 MHz (input) and 449.775 MHz (output); Running Springs-444.025 MHz (input) and 449.025 MHz (output); and Tujunga-444.625 MHz (input) and 449.625 MHz (output) (PRB Ex. 8, par. 3).

19. As noted, *supra*, the Mt. Otay repeater has four frequencies: 147.390 MHz (input); 147.990 MHz (output or input); 444.625 MHz (input); and 449.625 MHz (output) (PRB Ex. 8, pp. 1-2, 5). The frequencies 147.390 MHz and 147.990 MHz are 2 meter VHF frequencies.[15] The frequencies 444.625 MHz and 449.625 MHz are UHF frequencies (PRB Ex. 8, p. 2). When a

[13] As of February 19, 1984, the Mt. Laguna repeater was temporarily removed from the system. On that date, the only repeaters which would be employed for communications within the San Diego area were the Mt. Woodson and Mt. Otay repeaters (PRB Ex. 8, par. 8).

[14] Ultra High Frequency (300-3,000 MHz).

[15] The 2 meter repeaters operate in the FM mode (Tr. 55).

signal comes in on 147.39 MHz, it is retransmitted on 147.99 MHz and on 449.625 MHz (PRB Ex. 8, pp. 1-2, 5). When a signal is received on 444.625 MHz, it is retransmitted on 449.625 MHz and on 147.99 MHz (PRB Ex. 8, pp. 2-5). The repeater can also receive on 147.99 MHz; then the signal is retransmitted on 449.625 MHz only (PRB Ex. 8, pp. 1-2, 5). The repeater on Mt. Otay is linked to several other DRONK repeaters via 147.99 MHz (PRB Ex. 8, pp. 2, 4).[16] These repeaters are used by a loose knit group of amateurs (Tr. 224).

20. The 147.39 MHz and 444.625 MHz inputs have priority over the 147.99 MHz input. If signals are simultaneously received on 147.99 MHz and either 147.39 MHz or 444.625 MHz, then the 147.99 MHz receiver is automatically turned off and the communications on the other frequency will be transmitted on 147.99 MHz (PRB Ex. 8, par. 7).

21. All the repeaters in the DR0NK system are "closed." Users must access the inputs of all repeaters in the system through the use of coded squelch.[17] In addition, the Mt. Otay 147.99 MHz receiver remains open for 15 seconds after the tone is withdrawn (which enables monitoring of 147.99 MHz via 449.625 MHz) (PRB Ex. 8, par. 4).

22. All repeaters in the system are equipped with time-out timers. The transmitters of four of the repeaters (all except Mt. Woodson) are automatically "timed out" (deactivated) after an incoming signal has been on for 3 minutes and 50 seconds and remain deactivated until the encoded signal is withdrawn or another input has been accessed. The Mt. Woodson repeater's timer works differently from those of the other repeaters. Its transmitters time out after 2 minutes and 15 seconds and can be reset only by the withdrawal of the encoded signal. Thus, a continuous signal lasting longer than 2 minutes and 15 seconds would effectively remove the Mt. Woodson repeater from the system.

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[16] If communications are transmitted to a repeater's UHF input, they will be retransmitted on 147.99 MHz (and on UHF) and reach the 147.99 MHz inputs of the other repeaters in the system, which will then retransmit the communications on their UHF outputs (PRB Ex. 8, para. 5).

[17] Coded squelch (continuous tone coded squelch system or "CTCSS") means that a radio user must transmit a continuous subaudible tone along with the carrier (*i.e.*, along with his message) in order to open the repeater's receiver and keep it open for his communications (PRB Ex. 8, p. 2).

E. The Events of February 19, 1984

(1) Interference Experience by Amateurs on February 19, 1984

(a) Thomas W. Goldrich, Jr.

23. Thomas W. Goldrich, Jr. (Goldrich) has been an Amateur for about 20 years, and has an Extra Class license (Tr. 258). He was at one time an electronics technician. He had received electronics schooling in the U.S. Navy (Tr. 259). He is now an attorney (Tr. 258). He was at home on the afternoon of February 19, 1984[18] (Tr. 259). Shortley after 5:00 p.m., he noted music being played through the DR0NK repeater system. He monitored the music on 147.99 MHz (Tr. 259). When the music stopped, he attempted to make a call on 147.99 MHz to get the details as to why it was happening (Tr. 259). However, as he started to transmit, the music resumed (Tr. 259, 260–61). He could tell this was so because he also had a scanner tuned to 449.625 MHz. This enabled him to listen to the output of the repeater while transmitting on 147.99 MHz[19] (Tr. 260–61).

24. Goldrich recalled that from about 5:30 p.m. to about 7:00 p.m., the music was intermittent and that from approximately 7:15 p.m., the music became almost continuous (Tr. 264). He further recalled that the majority of the music was country and western, but that later on it may have changed to easy listening (Tr. 264). In the earlier part of the evening, when the music was intermittent, when it would stop he would attempt to make a call or someone else would attempt to make a call and he would hear one or two syllables (Tr. 265, 267–68). He thought he could recognize Stuart Hacken's voice on occasion, but all he would hear would be one or two syllables and then the music would override the person who was attempting to use the DR0NK system (Tr. 265).

25. To determine the source of the problem, Goldrich took bearings on the signal (Tr. 261–63). He took one bearing in the 5:00 p.m. to 5:30 p.m. period, reading off the directional indicator from the rotating equipment inside his house (Tr. 262). Goldrich rotated the directional antenna 360° and noted the signal strength meter, which indicated the strength of the signal. When the meter reads the maximum of the strength, it furnishes a

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[18] His residence is 10757 Vista Valle Drive, San Diego (Tr. 258).

[19] As detailed, *supra*, the 147.99 MHz input is retransmitted on 449.625 MHz (Tr. 261; PRB Ex. 8, pp. 2, 5).

"rough approximation" of the direction of the signal, plus or minus 10° (Tr. 262).

26. Between 7:00 p.m. and 7:30 p.m. he took an additional bearing (Tr. 262). He again rotated his directional antenna while watching the signal strength meter, which showed how strong the received signal was (Tr. 262). When the signal strength was at its highest on the meter, the antenna was pointing in the general direction from which the signal was coming (Tr. 262). Then he went outside with a "very accurate compass" and sighted down the boom of the antenna and took a compass reading (Tr. 262-63). He plotted it on a map and then called James Allen and Stuart Hacken to obtain bearings from them (Tr. 263). Allen could not receive the signal on 147.99 MHz directly at his house, but Hacken supplied Goldrich with a bearing (Tr. 263). Goldrich plotted his and Hacken's bearings on a map and found that they crossed in the area of Alpine (Tr. 263).

(b) Stuart M. Hacken

27. Stuart M. Hacken (Hacken) has been an Amateur for about 17 years and has an Extra Class license[20] (Tr. 272-73). He is a sales representative for Motorola Communications (Tr. 272). He was at home on the afternoon and evening of February 19, 1984 (Tr. 273), and was monitoring his amateur radio on 147.99 MHz (Tr. 273). He heard western-style music on the frequency (Tr. 275). His "ballpark" estimate was that the music went on from about 5:00 p.m. to about 8:00 p.m. (Tr. 277). In the beginning, it was off and on and then later it was continuous (Tr. 275, 277).

28. Hacken tried to contact Goldrich and Allen by radio (Tr. 274). He tried to transmit on 147.99 MHz. When he would release his microphone button so that his radio could receive, he would hear music (Tr. 274). At times he was barely able to discern other people trying to transmit, but not clearly enough to tell who it was or what they were saying (Tr. 275).

29. Hacken took a bearing on the signal on 147.99 MHz by reading the signal strength meter on his radio and turning his directional antenna to where the signal was strongest, which was due east (Tr. 276). As noted, *supra*, he reported this bearing to Goldrich on the telephone (Tr. 277).

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[20] His residence is 5071 Cole Street, San Diego (Tr. 272).

(c) James L. Allen

30. James Allen (Allen) had been an Amateur for about 25 years. He holds an Advanced Class license[21] (Tr. 238–39). He is an attorney (Tr. 239). On the afternoon and evening of February 19, 1984, he was at home (Tr. 241). He was casually listening to a walkie-talkie which was tuned to 449.625 MHz[22] (Tr. 241–42). In the late afternoon, he received a telephone call from Goldrich, who told him that country and western music was being played over the repeater (Tr. 242–43). On listening to the radio on 449.625 MHz, he heard the music (Tr. 243). He called Grigsby, the Engineer in Charge of the Commission's San Diego Office, on the telephone at around 5:00 p.m. to 5:30 p.m.[23] (Tr. 178, 249).

31. Later, around 7:00 p.m., Allen made a transmission on the repeater's UHF input, 444.625 MHz (Tr. 243). The music was not being transmitted, having been off for "quite a little while" (Tr. 243). He made a transmission to inquire whether anyone knew the results of the previous night's "T-hunt"[24] (Tr. 244). When he unkeyed the transmit button on the walkie-talkie to receive a reply, he heard music and this continued for several seconds (Tr. 244). After a delay of a few seconds, Allen recognized Hacken's voice. However, Hacken's voice and signal were obliterated by another burst of music after a few syllables (Tr. 245). When there was a period of silence, Allen attempted to transmit again to reach Hacken (Tr. 245). When he unkeyed to receive, he again heard music for another 10 or 15 seconds (Tr. 245). He again heard Hacken attempting to reply, but the music obliterated Hacken's voice after a few syllables (Tr. 245). Allen made several more attempts like this over a period of about 30 minutes, with the same result (Tr. 245–46).

32. Allen recalled that the country and western music became continuous around 7:30 p.m. and went on for about 30 minutes (Tr. 246–47). During this time, Allen was not paying undivided attention to his radio; he had it on in the background (Tr. 241, 247). He wife was ill and he was taking charge of his 8 and 10 year old boys, making dinner, getting them started on baths and homework, and generally supervising them (Tr. 247).

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[21] His residence is 10905 Dutton Drive, La Mesa, California (Tr. 238).

[22] On this frequency, 449.625 MHz, he could receive transmissions from the DR0NK repeater that went into the repeater on 147.99 MHz (PRB Ex. 8, pp. 2, 5; Tr. 242).

[23] Allen's conversation with Grigsby is detailed, *infra*.

[24] A "T-hunt" (transmitter hunt) is a direction finding contest (Tr. 254).

(2) Grigsby's Direction Finding Efforts Re Interference

33. Grigsby has been the Engineer in Charge of the Commission's San Diego Field Office for four years (Tr. 47-48). He has been employed with the Commission since 1967 in engineering positions and has a Bachelor of Science degree in Electrical Engineering (Tr. 48). He is experienced in monitoring and electronically locating the source ("direction finding" or "DF'ing") of radio signals (Tr. 48). He has used direction finding methods to locate the source of radio transmissions more than 2,000 times, including in excess of 100 times to locate the source of amateur radio transmissions (Tr. 49-50). He has prepared written transcripts from tapes of monitored transmissions in excess of 400 times (Tr. 50). He has used voice correlation methods to identify the voice of an operator which he has heard while monitoring at least 1,000 times[25] (Tr. 51).

34. As noted, *supra*, during the afternoon of February 19, 1984, Grigsby received a telephone call from Allen, who told him that he suspected that Smith was playing music into the input of DR0NK network (Tr. 72). As a result, starting about 7:00 p.m., Grigsby commenced monitoring Smith's transmissions in the Commission DF vehicle while en route to Smith's neighborhood in Alpine, California[26] (Tr. 60). The equipment in the DF vehicle included two radio receivers, an electronic direction finder, a tape recorder and an RF attenuator (Tr. 53). Using this equipment, Grigsby initially monitored the frequencies 146.04 MHz and 146.64 MHz, the input and output of the SANDRA repeater, and 147.99 MHz, the DR0NK repeater frequency[27] (Tr. 58-62, 154). Using the stereo tape recorder, he recorded some of the signals he was monitoring. Sometimes he recorded the same frequency into both channels of the tape recorder, sometimes a different frequency into each channel (Tr. 62). He changed the frequencies

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[25] He previously testified on all of these types of matters in six Commission proceedings and once in court (Tr. 51-53).

[26] Grigsby left the parking lot of the Commission's office in La Mesa, California at 7:03 p.m. and headed to the Alpine area (Tr. 72).

[27] Grigsby recognized Smith's voice in transmissions between 7:03 p.m. and 7:15 p.m. on the SANDRA network frequency, 146.04 MHz (input)/146.64 MHz (output). Smith was talking with Steve Bingham, KA6CUF, from 7:03 p.m. to 7:09 p.m. These transmissions are set forth in the intercept (PRB Ex. 7, pp. 1-8). At 7:25 p.m., the tape recorder was turned off (Tr. 157). At 8:56 p.m., Grigsby monitored the 146.04 MHz frequency for 34 seconds and heard Smith talking on that channel at the same time he was rebroadcasting music on 147.99 MHz. Grigsby monitored both frequencies starting at 7:57 p.m. and recorded both Smith (W6VCE) and Bingham conversing on 146.04 MHz at 7:57 p.m. (PRB Ex. 7, p. 10).

that he was monitoring and/or recording from time to time (Tr. 60-62; PRB Ex. 7; Smith Ex. 18).

35. At about 7:40 p.m., Grigsby started monitoring 147.99 MHz. He heard country and western music, which appeared to be a rebroadcast of broadcast station KCBQ-FM (Tr. 60; PRB Ex. 7, pp. 8-9). He used the direction finder to trace the music to its source, 2610 El Tinge Drive, the residence of Smith (Tr. 60-64). He made several passes by Smith's house and made positive directional findings to his house four times between 7:40 p.m. and 7:58 p.m.; namely, 7:45 p.m., 7:47 p.m., 7:51 p.m. and 7:56 p.m. (Tr. 65-66, 113-14; Smith Ex. 18). Grigsby explained that he made the notes as to the times of the DF'ing "at one time," sometime after 7:56 p.m. and before 9:16 p.m. (Tr. 163-66). Grigsby also explained that the clock in the Commission's vehicle does not read seconds, only hours and minutes, and that there could be a fluctuation of "pretty close to a minute," since he might have read the time at the beginning of the minute as he started his loop around the area and ended it at the close of another minute (Tr. 202-03). The loop entailed going west on El Tinge Drive, north onto Marshall Road, east on Alpine Boulevard, south on South Grade Road, and west on El Tinge Drive and back to 2610, Smith's residence, when another positive DF would be made (Smith Ex. 1; Tr. 66). Smith logged the distance of the loop that Grigsby made as between 2.3 and 2.5 miles (Tr. 417). According to Smith, it would take 5 minutes and 15 seconds (an average of 27.6 miles per hour) to complete the loop (Tr. 418). Grigsby, on December 2, 1984, the Sunday night prior to the commencement of the hearing, again drove the "loop," taking 3 minutes and 49 seconds to complete it (Tr. 503-04).

36. On two of the passes, Grigsby saw Smith through a window, standing in his radio room, which is in the front of his house (Tr. 68-69). He DF'ed the music as coming from Smith's house a fifth time at approximately 8:11 p.m. (Tr. 115). At no time, as he was driving around the streets in the neighborhood, did he see any indication that the transmission of the music was coming from any source other than 2610 El Tinge Drive (Tr. 67-68). Grigsby expressed certitude as to the correctness and accuracy of his pinpoint DF's of the transmission of the music[28] (Tr. 503).

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[28] Grigsby also DF'ed the country and western music as being transmitted from Smith's residence on 147.99 MHz at 8:11 or 8:12 p.m. He also DF'ed the buzzing sound as being transmitted from Smith's residence on 146.64 MHz at 8:50 p.m. This buzzing sound was transmitted from 8:47 p.m. to 8:51 p.m. (Tr. 89-90, 102-03, 416-17; PRB Ex. 7, p. 20; Smith Ex. 8, p. 2).

37. Grigsby observed that, during his monitoring on February 19, 1984, the country and western music transmitted from Smith's station continued from 7:40 p.m. to about 8:11 or 8:13 p.m. (Tr. 124-26; PRB Ex. 7, pp. 8-10, 12). At no time during this period was this transmission from Smith's station identified by an amateur call sign (PRB Ex. 7, pp. 9, 12; Tr. 79).

38. Grigsby also observed that, for a short period after the country and western music stopped, there was conversation by others on the 147.99 MHz frequency (PRB Ex. 7, p. 12). Starting at 8:19 p.m., "easy listening" music, apparently from a different broadcast station, was rebroadcast on 147.99 MHz. Grigsby DF'ed the easy listening music on 147.99 MHz to Smith's residence at 8:24 p.m. (Tr. 116). This music went on until about 8:29 p.m. (Tr. 63; PRB Ex. 7, p. 12). This transmission from Smith's station was not identified by his call sign (PRB Ex. 7, p. 12).

39. During the period when he was monitoring music and driving in Smith's neighborhood, Grigsby heard heterodyne in his receiver under the music[29] (Tr. 108). Grigsby observed nine obvious instances of heterodyne between 7:40 p.m. and 7:58 p.m. and eight instances between 8:19 p.m. and 8:28 p.m. (Tr. 129). This indicated to Grigsby that Smith's signal was interfering with other signals on the channel (Tr. 109-10, 117-20, 126-29). He was of the opinion that the music was causing harmful interference to communications on 147.99 MHz (Tr. 127-28).

40. Smith criticizes the rough notes and sketches in Grigsby's contemporaneous mobile operations log (Smith Ex. 18), noting that the DF lines, all of which were made later on El Tinge Drive, drawn by Grigsby "have no direction or azimuth" and that all join at one point in the center of Smith's residence and at a place "other than where Smith's yagi aerial was located."[30] The Presiding Judge agrees with the Bureau that one would expect that notes and sketches made by Grigsby while driving and observing and adjusting various pieces of equipment would look rough (Tr. 61-62). Suspicion might be aroused as to the authenticity of such a depiction if it looked like a finished report with precise drawings to scale.

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[29] Heterodyne exists where there are two signals which are relatively close to each other in strength rather than one being substantially stronger than the other (Tr. 56). The heterodyne is heard in the receiver as a squeal or whine (Tr. 56). One of the signals may be heard quite sufficiently, parts of both may be heard or it may be so bad that the signal is not intelligible, depending on the particular circumstances (Tr. 56-57).

[30] Paragraph 37 of Smith's findings.

41. Smith also criticizes[31] Grigsby for his failure to have taken directional findings on the north side of Smith's residence, from Kenda Road, as well as on the east, from Calle Compradres and the west from Tavern Road (Smith Exs. 15 and 16). However, Grigsby's failure to have taken bearings from more points than he did is not of decisional significance. It is ruled that he took sufficient bearings reading off a sophisticated electronic direction finder from a number of points along El Tinge Drive to establish conclusively that the transmission of music was coming from Smith's house (Tr. 53-54, 60-64). At no time while Grigsby was driving the loop on the various streets in Smith's neighborhood was there any indication that the signal was coming from anywhere other than Smith's residence (Tr. 67-68).

42. As noted, *supra*, the frequency 147.99 MHz is both an input and output of the DR0NK repeater (PRB Ex. 8, p. 1). Grigsby explained that if the frequency were in use as an output, the interference would have been caused in the Alpine area, perhaps in a radius of 5 to 10 miles, to amateurs who were trying to receive the output of the repeater but received Smith's transmissions of music instead[32] (Tr. 117-18, 128). If the frequency were in use as an input, so that Smith's music transmissions were going into the DR0NK repeater instead of the legitimate transmissions which were being interfered with, then the area which would have been affected by Smith's interference would be the whole San Diego area (Tr. 117-19, 128).

43. During periods when Smith was not interfering with the repeater frequency, Grigsby observed conversation on 147.99 MHz which, in his opinion, confirmed that the transmission of music by Smith was adversely affecting communications on the repeater[33] (Tr. 121-22; PRB Ex. 7, pp. 12, 13). At 8:15 p.m., in an interval between music broadcasts, KF6Z[34] said, "Got rid of that obnoxious music" (PRB Ex. 7, p. 12).

44. The signal intensity, as read on the meter, peaked when

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[31] Paragraph 40 of Smith's findings.

[32] This represents "FM capture." If there are two FM signals being received at the same time and one of the signals is substantially stronger than the other, then the stronger signal will capture the receiver and the weaker signal will not be heard at all (Tr. 55). In the context of a repeater, which has both a receiver and a transmitter, this means that the stronger signal would be received and retransmitted and the weaker signal would not be received and retransmitted (Tr. 55-56).

[33] As noted, *supra*, the country and western and easy listening music was broadcast by Smith from 7:40 to 8:13 p.m. and from 8:19 to 8:29 p.m., respectively.

[34] KF6Z is Thomas Goldrich's call sign (Tr. 258).

Grigsby drove in front of Smith's house, 2610 El Tinge, and, as he drove away, the intensity fell off (Tr. 115, 152).

(3) Smith's Denial That He Caused Interference on February 19, 1984

45. Smith maintained that on February 19, 1984, he was at the Grossmont Shopping Center, which he left at approximately 5:30 p.m. to 6:00 p.m., arriving at his home, 2610 El Tinge, some 35 minutes later (Tr. 37). All voice transmissions attributed to W6VCE, Smith, on February 19, 1984 were stipulated to actually be the voice of Smith (Tr. 96-97; PRB Ex. 7). However, Smith denied broadcasting any music on 147.99 MHz on February 19, 1984 (Tr. 382). Smith also denied that he made statements on February 19, 1984 on 146.04 MHz, the SANDRA repeater frequency, that he was a jammer[35] (Tr. 38-44). Smith expressed his suspicion that someone was transmitting his taped voice and the music from a location somewhere near his home (Tr. 382, 470-72).

46. Smith denied that on February 19, 1984, he had the subaudible tone necessary to access the DR0NK repeater (Tr. 384). He maintained that he only had a device (a "tone Snoopy") to measure the frequency of such tones (Tr. 383-84, 465-66; PRB Ex. 4, p. 2, Item 11(n)). However, it is noted that Gastil recalled talking to Smith on the DR0NK system, perhaps in January or February 1984 (Tr. 237). Smith denied talking on the DR0NK system at all in 1984 (Tr. 384).

(4) Smith's Contention Re February 19, 1984 Transmissions

(a) The Bureau and Smith Intercepts

47. The intercept of February 19, 1984 (PRB Ex. 7) was prepared by Grigsby after listening to both channels of the tape made by him during the monitoring on February 19, 1984. Smith

[35] At 7:59 p.m. on February 19, 1984, W6VCE, Smith, broadcast on 146.04 MHz that " . . . Jim Smith's a jammer and a bigot and a ripple from Alpine and don't any of you ever forget it" (PRB Ex. 7, p. 11). While denying that he made this statement on February 19, 1984, Smith acknowledged that he made such statements at other times, when he had been drinking (Tr. 24, 40-41, 57, 468-69). Smith acknowledged that he "could have said" during a telephone conversation with a member of the Commission's staff in Washington on or about March 23, 1984 that he honestly didn't know whether he did or did not broadcast the music on February 19, 1984 and that he gets so upset sometimes (Tr. 46).

prepared an intercept (Smith Ex. 2) after listening to the tape supplied to him or his agent by the FCC. Smith's transcript separates the left and right channels and contains some transmissions not contained in PRB Exhibit 7.

48. Smith attributes significance to a number of transmissions which appear in his intercept. They are as follows:

a. "Go, brown Volkswagen" (Smith Ex. 2, pp. 2, 13).

b. "Jimmy, I mean Lulubell, come out and play" (Smith Ex. 2, p. 3).

c. "Jimmy — Jim-Jim" (Smith Ex. 2, pp. 3, 20).

d. "Garage door closed? Yes" (Smith Ex. 2, p. 4, (left channel only).

e. "Hello, Jimmy, did you look out your window recently?" (Smith Ex. 2, p. 31).

f. "Jimmy, the night has eyes, baby" (Smith Ex. 2, p. 31).

g. "Look out the window again, Jimmy" (Smith Ex. 2, p. 31).

h. "Look out the window again, Jimmy, look out your — we are watching you" (Smith Ex. 2, p. 32).

i. "Yes, kitchy-koo, Jimmy, kitchy-koo, we're watching you, baby" (Smith Ex. 2, p. 32).

Items a., e., f., g., h. and i. appear in the Bureau's intercept[36] (PRB Ex. 7). The omissions in the Bureau's intercept resulted from either inadvertence or because Grigsby, who heard these transmissions, did not consider the items important to the case (Tr. 69-70, 171, 176-77). Grigsby acknowledged that the signal of the transmission that made reference to Jimmy looking out the window was sufficiently loud that it was his belief that it was originating "in the area of Smith's house — in other words, in the vicinity of the community of Alpine" (Tr. 177).

(b) The Two Second Gap

49. As noted, *supra*, Smith obtained from the Commission a copy of the tapes made by Grigsby during his monitoring of February 5 and 19 (Tr. 293-94). Smith brought the February 19 tape to Steven Wetherbee and asked him to determine if the tape had been tampered with (Tr. 291, 298-99, 309-11). Wetherbee, an "audio engineer," owns the Golden Track Recording Studio (Tr. 286). He works with tape, doing everything from records to radio

[36] PRB Exhibit 7, the Bureau's intercept, refers to a "black" Volkswagen.

and TV commercials (Tr. 285–86). His work includes tape editing. However, it does not include investigating and testing tapes (Tr. 286, 290). He is not an expert on radio and does not know anythng about scanning receivers or scanners (Tr. 290, 323–24, 326).

50. On the February 19 tape, there is a dead spot where there was no audio input to one channel (on the stereo tape) for a period of approximately one to two seconds at 7:56 p.m. (Tr. 318; PRB Ex. 7, p. 10). This indicated to Wetherbee that the tape had been edited; the dead spot had been produced when the edited tape was being created. He was of the view that the tape recorder, which was recording, started up before the recorder which was playing what was being put onto the tape (Tr. 313–14). Wetherbee explained that such a dead spot would result if there was no audio feed or input (Tr. 324–25). He noted that shortly after the word "NN6," the music comes back on with a certain noise (Tr. 319; PRB Ex. 7, p. 10) that indicated to him that there was an "overdub"[37] (Tr. 315). From his examination of this portion of the tape, Wetherbee concluded that, assuming that the copy he analyzed had not been tampered with, then there had been tampering with the Commission tape of which it was a copy (Tr. 312, 322). He expressed the opinion that the voice of Smith on the 7:56 p.m. transmission was dubbed in over music (Tr. 315, 319, 321–22).

51. Grigsby explained how it happened that there was the two second dead spot and the subsequent noise (Tr. 498–502). His explanation is as follows: The right channel of the tape was being fed by the scanning receiver (Tr. 498). The scanning receiver has 16 positions and the frequency on each is programmed in (Tr. 498). At the point where the dead spot on the tape is occurred, he was in the process of changing the frequency on the scanner from 149.99 MHz to 146.04 or 146.64 MHz (Tr. 498; PRB Ex. 7, p. 10). To accomplish this he put his finger on a switch and "stepped" the channels manually until he came to the next frequency that he wanted (Tr. 498). Because the squelch on the scanner was closed, there was no audio output from the scanner at all as there were no signals on the channels he was passing (Tr. 498). Since there was no audio output from the scanner, there was no audio input into the tape recorder (Tr. 499).

52. Grigsby also explained the reason for the noise when the

[37] An overdub occurs when material is recorded over something that is already on the tape and then the tape is stopped and what was previously on the tape continues from that point (Tr. 315, 319).

music started 34 seconds after that[38] (Tr. 501-02; PRB Ex. 7, p. 10). He had the scanner on 146.04 MHz or 146.64 MHz, intercepting Smith's voice transmissions, and manually switched the scanner back to 147.99 MHz (Tr. 501). At that point, there was a noise for a very short period which he believes was caused by his tuning through a channel on the scanner that had activity on it (Tr. 502). The two second dead spot immediately precedes the W6VCE communication at 7:56 p.m., and the noise immediately follows "NN6" at the end of the intercept of that particular communication at 7:56 p.m. (PRB Ex. 7, p. 10; Tr. 501).

(5) Smith's Claim that Grigsby Is Prejudiced Against Him

53. Smith believes Grigsby is prejudiced against him (Tr. 458). He described an incident which occurred during Smith's conflict with Frank Gifford, a business competitor, several years ago (Tr. 458, 461-62, 483-85).

54. Smith set forth this scenario: Gifford was at one time a tenant of Smith in his radio business; they had a falling out; Gifford then set up his own business at a different site and stole radio customers from Smith (Tr. 458, 462-63, 483-85, 487). Grigsby became involved in this dispute. However, the result of his involvement was that Smith got most of his customers back (Tr. 485).

55. Smith also maintained that he had made complaints from time to time concerning amateur matters to Grigsby and that Grigsby had not acted on his complaints (Tr. 462). Grigsby recounted that Smith had complained to him that the DR0NK repeater violated the station identification rule (Tr. 186-87). Grigsby explained that in setting priorities as to what to investigate, interference is considered more serious than failure to identify and that he has to respond to complaints of a hue and cry nature before responding to complaints that are not (Tr. 205).

(6) Bingham's Claim That He Transmitted Music On February 19, 1984

56. Steve Bingham, a school teacher, is an Amateur, KA6CUF (Tr. 346). He is a friend of Smith (Tr. 366). He and his son own a repeater on Monument Peak in the Laguna Mountains, San Diego (Tr. 346-47). The repeater is on a site owned by Smith, who

[38] Because Grigsby had the scanner on the frequency on which Smith was talking for only 34 seconds, Smith's remarks are completely unrelated to what preceded and succeeded them on the tape (Tr. 498-502; PRB Ex. 7, p. 10).

does not charge him rent (Tr. 365-66). Bingham related his experiences on February 19, 1984.

57. According to Bingham, he and his wife had gone to the repeater site and then to dinner at about 5:30 p.m. to a restaurant located in Julian, California, which is in the mountains in eastern San Diego County (Tr. 346-47; PRB Ex. 8, p. 6). He and his wife left the restaurant between 6:30 p.m. and 7:00 p.m. He drove back to his home, taking the Sunrise Highway, then back through the Laguna Mountains on a connecting road, then over on Interstate 8 by Alpine and eventually to his residence in Lakeside[39] (Tr. 348). He estimated that it took about half an hour to go from Julian to the Laguna Mountains and then down the grade to Interstate 8[40] (Tr. 348-49). When he reached the Laguna Mountains, he made a right turn and the road descended. This road has some cutbacks and switchbacks (Tr. 358). This portion of the road connecting the Sunrise Highway with Interstate 8 is about ten miles long (Tr. 363). He estimated that the entire trip to his home took about an hour and a half (Tr. 348).

58. Bingham related that during this drive, he was talking on his amateur radio, through his repeater, with Smith (Tr. 349). They were being harassed by two persons, whom he believes to be a couple of kids by the names of Jerry and Doug[41] (Tr. 349). This conversation and harassment went on perhaps 7:00 p.m. to 7:15 or 7:20 p.m. (Tr. 349). Bingham became upset and switched his radio to the DR0NK frequency, 147.390 MHz[42] to tell whoever might be listening to call "their boys" off (Tr. 349, 359). However, Doug and Jerry had followed him to the DR0NK frequency.[43] He was extremely agitated and upset and warned that if the harassment did not stop, he was going to jam the DR0NK frequency, 147.390 MHz (Tr. 350, 359, 365). He became disgusted, but he did not turn his radio off; rather, he threw the microphone down between the seats[44] and turned the car broadcast radio on and listened to

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[39] He was driving a Honda Civic (Tr. 350), which has a four cylinder engine (Tr. 360).

[40] Sunrise Highway is to the east of Route 79 and is basically a plateau road (Tr. 357-58; PRB Ex. 8, p. 6).

[41] Smith did not testify with respect to this incident. However, PRB Exhibit 7 sets forth a transcript of a conversation between Smith (W6VCE) and Bingham (KA6CUF) on the SANDRA network, 146.04 MHz, from 7:03 to 7:09 p.m. and at 7:57 p.m. (PRB Ex. 7, pp. 1-4, 10).

[42] Bingham had a subaudible tone to access the DRONK network (Tr. 349).

[43] Bingham had told these two youngsters that he was going over to the DR0NK frequency (Tr. 364).

[44] He estimated that he did this at about 7:15 or 7:20 p.m. (Tr. 351).

western music all the way down the mountain, turning the music off about 8:10 p.m.[45] (Tr. 351).

59. According to Bingham, as he was driving, he noticed that all the lights on his amateur radio were lit up, which indicated to him that someone was jamming the DR0NK frequency (Tr. 350). When he got home, at approximately 8:00 or 8:10 p.m., he found that his radio was in the transmitting mode, not the receiving mode, and concluded that it was he who had been jamming the frequency (Tr. 351-52). He explained that his wife had been sleeping all the way down the mountain[46] (Tr. 351-52). He speculated that when his wife decided to go to sleep, she leaned to the right to pull the lever to make her seat recline and that this caused the microphone to drop down a bit, and when she leaned back, the seat was compressed and keyed the mike for transmission by pressing down on a switch on the side of it (Tr. 362). Bingham concluded that he had inadvertently been retransmitting the country and western music he had been listening to on his broadcast radio (Tr. 352).

60. Grigsby, however, was certain that he did not hear any engine noise, road noise or other background noise with the music which was transmitted on 147.99 MHz, Further Grigsby emphasized that he was certain as to the correctness of his pinpointing DF'ing to Smith's residence (Tr. 503).

61. Bingham recalled that for the next few days following the February 19, 1984 incident of the retransmission of music on the 147.99 MHz frequency, everyone was talking on the radio about how Smith had maliciously jammed the frequency all night long (Tr. 353). It was common discussion on all channels (Tr. 353).

62. Bingham claimed that, in an attempt to inform the FCC that it was he who had unintentionally jammed the frequency on February 19, 1984, and not Smith, he visited the FCC San Diego office within a week of the incident and spoke with Grigsby (Tr. 352). He maintained that he told Grigsby he knew who was responsible for the jamming. However, Bingham acknowledged that he did not tell Grigsby that it was he who did it, because, according to him, he feared he would be cited for violating the Rules (Tr. 352—53). He explained that he only intended to tell Grigsby that Smith didn't do the jamming and that he felt the matter "would just go under the carpet" must be rejected as

[45] He explained that the times which he related were not based on his memory, but on listening to the Commission's tape and verifying the times when certain events were supposed to have occurred (Tr. 359).

[46] Bingham's wife did not testify.

contrary to normal behavior and expectations and so inherently improbable as to be disingenuous.[47] Bingham claimed that he told Grigsby he knew who did the jamming and that Grigsby told him he couldn't discuss the case with him (Tr. 352–55). Bingham also claimed that, after Smith received his "citation" for jamming, he paid a second visit to the San Diego office and spoke with either Grigsby or Fernando Gali, an FCC engineer, but that he, again, did not disclose that it was he who, purportedly, did the jamming on February 19, 1984 (Tr. 355–56). It was not until the parties were required to exchange their exhibits and notify as to the witnesses and the nature of their testimony that it was disclosed to the Bureau that Bingham would claim that he was responsible for the jamming which occurred on February 19, 1984[48] (Tr. 372–73).

F. The March 11, 1984 Inspection of Smith's Amateur Station

63. Grigsby had not conducted an inspection of Smith's Amateur station on February 19, 1984, when he had DF'ed the interfering signal as originating from Smith's home.[49] However, on March 11, 1984, Grigsby, along with Gali, a Commission engineer, inspected Smith's station at 2610 El Tinge Drive at about 4:00 p.m. (Tr. 141, 208, 462). Present were Smith, his wife, Walter Horner, a friend of Smith's who was visiting at the time, (Tr 5. 145–46, 211–12, 375, 464). In addition, Smith showed Grigsby another radio, which he said was not operative (Tr. 145, 465). Smith recounted that there was yet another inoperable radio which Grigsby may not have seen (Tr. 465). Grigsby did not conduct any tests on the radio Smith said was inoperable for fear of damaging it further (Tr. 202). Grigsby asked Smith if he had the subaudible tone necessary to access the DR0NK repeaters, and Smith replied he did not[50] (Tr. 465).

64. Grigsby observed two two meter Amateur antennas at Smith's residence (Tr. 142–44). One of them was an 11 element Yagi beam antenna mounted in the garage and permanently pointed at Mt. Otay, the location of the SANDRA 04/64 and DR0NK repeaters (Tr. 142–44, 464; PRB Ex. 4, p. 2, Item 14).

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[47] *The Prattville Broadcasting Co.*, 5 FCC 2d 601, 602 (Rev. Bd. 1966).

[48] This notification was made in November 1984, a week before Thanksgiving (Tr. 372–73).

[49] The record is silent as to why such inspection was not conducted on February 19, 1984.

[50] Smith offered to take his equipment apart and Grigsby said he would take Smith's word for it (Tr. 466).

Ultimate Findings and Conclusions

1. James W. Smith (Smith) is the licensee of Amateur radio station W6VCE, located at 2610 El Tinge Drive, Alpine, California. He is also the holder of an Advanced Class Amateur radio operator license. These current licenses were granted on October 27, 1981 and are due to expire on October 27, 1986.

2. The issues in this proceeding seek to determine whether Smith willfully and/or repeatedly violated the following Commission rules: Section 97.125 (willful or malicious interference); Sections 97.84(a) and 97.123 (failure to identify); and Section 97.113 (in that Smith's transmissions represented broadcasting). Lastly, the issues seek to determine whether Smith violated Section 97.115 by transmitting music over his Amateur station. Ultimately, it must be determined whether Smith's Amateur radio station license for Station W6VCE should be revoked and whether the suspension order issued relative to Smith's Advanced Class Amateur radio operator license should be affirmed, modified or dismissed. For the reasons set forth, *infra*, it is concluded that revocation of the Station W6VCE license and suspension of Smith's Advanced Class Amateur radio operator license are warranted.

3. The findings establish that on February 19, 1984, Smith, without identifying this station, transmitted country and western and easy listening music over his Amateur radio station, willfully and maliciously causing interference to other amateur operators. This conclusion rests upon the findings as to the directional finding activities of William H. Grigsby (Grigsby), Engineer in Charge of the FCC San Diego Office. Grigsby, by utilizing sophisticated direction finding equipment, traced the source of the music on the frequency 147.99 MHz to Smith's residence several times between 7:40 p.m. and 8:11 p.m. on February 19, 1984. Grigsby also traced, by DF'ing, the buzzing noise transmitted on the frequency 146.64 MHz from 8:47 p.m. to 8:51 p.m. to Smith's residence.[51] Grigsby observed Smith standing in his radio room on that evening. Grigsby detected a number of instances of heterodyne during the period of his direction finding activities which established that Smith's signals were interfering with the operations of other amateur operators attempting to utilize the 147.99

[51] Grigsby's monitoring established that Smith broadcast country and western music from 7:40 p.m. to 8:11 or 8:13 p.m. and easy listening music from 8:19 p.m. to 8:29 p.m. on 147.99 MHz and that these transmissions were not identified by Smith's call sign.

MHz frequency.[52] It is found that Smith's transmissions on 147.99 MHz caused interference to other amateurs attempting to receive the output of the DR0NK network repeater within a radius of five to ten miles of Smith's residence. Those amateurs received Smith's transmissions of music rather than the transmissions made by DR0NK repeater users on 147.99 MHz.

4. It is not necessary to determine whether Smith was capable of accessing the DR0NK repeater during his transmission of music on 147.99 MHz on February 19, 1984, since the record clearly establishes that interference was caused on that frequency to anyone within the local area of Smith's transmissions. It is stressed that this holding that Smith transmitted music of a commercial broadcast station and intentionally caused interference to the other amateur operators on the 147.99 MHz frequency rests on the testimony of Grigsby and his definitive directional findings.[53] It is not necessary to place any reliance upon the testimony of Thomas W. Goldrich, Jr., Stuart M. Hacken or James L. Allen, and it is ruled that their efforts to determine the source of the interfering signal are not a basis for the holding that Smith maliciously violated the cited Commission rules.

5. The testimony of Steve Bingham that it was he who broadcast music on February 19, 1984 is rejected. It was quite apparent to the Presiding Judge that Bingham, a close friend of Smith's, was prepared to assume the responsibility for this reprehensible conduct in an effort to extricate Smith from the situation that Smith created by his improper actions. However, assuming, *arguendo*, that Bingham was transmitting music from his mobile amateur station in his automobile on the evening of February 19, 1984, this does not, in any way, offset or dilute the findings, which clearly establish that Smith was engaged in such activities on that evening. As noted by the Private Radio Bureau, Bingham's story does not explain the interference caused by the transmission of the easy listening music, nor does it explain, if he had mistakenly caused his amateur facility to rebroadcast music, how it was that he was conversing with Smith on 146.04 MHz at 7:57 p.m. Stated simply, Bingham's testimony is rejected as inherently unbelievable and improbable and manifestly false. *The Prattville Broadcasting Co.*, 5 FC 2d 601, 602 (Rev. Bd. 1966).C

6. Smith's contention that, since music was heard on both the

[52] Grisby noted the complaints of amateurs attempting to operate on 147.99 MHz as to the interference caused by the music transmitted by Smith.

[53] That Smith's action was deliberate is evidenced by the threat Smith made to the DR0NK repeater network on February 5, 1984.

147.99 MHz and 449.625 MHz frequencies, such transmissions of music were coming over the DR0NK repeater system, and that such music was not being accessed on 147.99 MHz, but was being accessed on 147.39 MHz or a UHF frequency, is rejected as unsupported by and contrary to the record evidence.

7. As noted, *supra*, it is not necessary to resolve whether Smith had the capability of accessing the DR0NK network on February 19, 1984 and whether, in fact, his transmissions of music on that evening entered the DR0NK repeater. The Presiding Judge agrees with the Bureau that there is some indication that Smith, in fact, did have a subaudible tone at that time and did access the DR0NK repeater on February 19, 1984. Jerry Gastil testified that he had spoken to Smith early in 1984 on the DR0NK network, and this could not have happened unless Smith has the subaudible tone at that time. Additionally, Allen's testimony that he heard the country and western music broadcast on 444.625 MHz during the evening of February 19, 1984 indicates that Smith had accessed the DR0NK repeater. However, the Presiding Judge is not prepared to rule, as urged by the Bureau, that the record conclusively establishes that Smith had such a subaudible tone on February 19, 1984 and that he accessed the DR0NK network.

8. The claim of Smith that Grigsby was prejudiced against him and that there was a conspiracy to entangle him in violations of the Commission's rules when, in fact, they had not occurred, is rejected as not supported by the record. Grigsby is an experienced and dedicated Commission employee, and there is no evidence to indicate that he was prejudiced against Smith.[54] Admittedly, there had been harassment of Smith by other amateurs, purportedly in retaliation for Smith's jamming activities on the repeater networks. However, none of the harassment activities against Smith justified his deliberate and willful transmission of music and buzzing signals on February 19, 1984. The Presiding Judge agrees with the Bureau that there can be no more serious violation of the amateur airwaves than preventing other amateur operators from communicating with each other. Smith's behavior on February 19, 1984, in deliberately causing interference by broadcasting music, is inexcusable and mandates revocation of his Station W6VCE license and suspension of his operator license.[55]

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[54] The fact that he had monitored Smith on a number of occasions prior to Februry 1984 does not establish such prejudice.

[55] As noted, *supra*, Smith violated the following sections of the Rules: 97.125, willful interference; 97.113, the dissemination of radio communications intended to be received by the public directly; 97.115, which prohibits the transmission of music; and, lastly, 97.84(a) and 97.123, failure to identify by call sign.

9. The Commission has emphasized that malicious interference[56] in the Amateur Radio Service is most serious and warrants the most stringent penalty of revocation. *Raymond C. Standring*, 68 FCC 2d 1021, 1024 (1978); *Harold R. Claypoole*, 95 FCC 2d 331, 335 (1983). Smith's conduct in willfully and repeatedly causing interference to other amateur radio stations on Februay 9, 1984 is of such a serious nature as to mandate the revocation of the license of Amateur Radio Station W6VCE and suspension of Smith's Advanced Class Amateur radio operator license. *Henry C. Armstrong, III*, 92 FCC 2d 485, 489 (Rev. Bd. 1983). The bureau is correct when it argues that there is no valid purpose of communication that could be served by the broadcast of music on the Amateur Radio Service band. Such transmission represents monopolizing of the frequency by causing interference to other amateur operators. It is not surprising that Smith did not identify these improper transmissions with his call sign.

10. If Smith, an experienced licensee, was of the view that his jamming activities were in retaliation for the actions of other amateurs which were violative of the Rules, it would still not justify his actions. The Commission has, on a number of occasions, stressed that it cannot tolerate the use of "vigilante tactics . . . ." The Review Board has emphasized that one who uses such tactics becomes part of the problem and only aggravates the situation. *Jonathan M. McFadden*, 75 FCC 2d 212, 214 (Rev. Bd. 1979). In summary, it is concluded that on February 19, 1984, Smith willfully and maliciously interfered with radio communications, in violation of Section 97.125, and, at the same time, violated Sections 97.113, 97.115, 97.84(a) and 97.123. These violations mandate the revocation of the station license and the suspension of Smith's Advanced Class Amateur radio operator license.

Accordingly, IT IS ORDERED that, unless an appeal from this Initial Decision is taken by a party or the Commission reviews this Initial Decision on its own motion, in accordance with the provisions of 47 C.F.R. 1.276, the Amateur Radio Station license W6VCE, licensed to James W. Smith, IS REVOKED and the

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[56] Interference is conduct reasonably calculated to interfere with the normal transmission of a radio signal. *Stephen A. Wichrowski, Jr.*, 15 FCC 2d 754 (Rev. Bd. 1968).

Amateur Advanced Class Operator license of James W. Smith IS SUSPENDED for the remainder of its term.[57]

FEDERAL COMMUNICATIONS COMMISSION

THOMAS B. FITZPATRICK, *Chief Administrative Law Judge*

[57] The Secretary is directed to serve a copy of this Initial Decision by Certified Mail, Return Receipt Requested, on the respondent at the address listed in the caption. In the event exceptions are not filed within 30 days of the release of this Initial Decision and the Commission does not review this case on its own motion, this Initial Decision shall become effective 50 days after its public release, pursuant to 47 C.F.R. 1.276. Upon the effective date of this Initial Decision, the licensee shall forward to the Commission the revoked and suspended licenses. Operation of the Amateur radio station specified above after the effective date of the license revocation is in violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. 301, and may subject any person operating such station to the penal sanctions specified in Section 501 of the Act, 47 U.S.C. 501.

Ownership and Management, Integration of
Real Party In Interest

Minority ownership interest in applicant without investment, held bona fide where contract provided minority owner with negative control over essential partnership and licensee functions. Integration credit denied for 95% owner where 5% owner assumed all financial responsibility and controlled applicant. Slight quantitative advantage for full-time integration off set by qualitative factors and part-time integration of majority ownership.

—*KIST Corp.*

BC Docket Nos. 81-863

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Kist Corp. Riverside, California	BC DOCKET NO. 81-863 File No. BPCT-810717KK
Sunland Communications Company Riverside, California	BC DOCKET NO. 81-867 File No. BPCT-810720KL
Bethel Broadcasting, Inc. Riverside, California	BC DOCKET NO. 81-868 File No. BPCT-810720KM
Riverside Family Television, Inc. Riverside, California	BC DOCKET NO. 81-870 File No. BPCT-810720KO

United American Telecasters, Inc. Riverside, California	BC DOCKET NO. 81-871 File No. BPCT-810720KQ
For a Television Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: September 18, 1985; Released: September 24, 1985

BY THE COMMISSION:

1. This proceeding involves mutually exclusive applications for a new UHF television station on channel 62, at Riverside, California. In an Initial Decision, FCC 83D-60, released November 4, 1983, 99 F.C.C. 2d 201, the ALJ found that United American Telecasters, Inc. (United) was not financially qualified to be a licensee and he granted the application filed by Sunland Communications Corporation (Sunland). In a Decision, FCC 84R-74, released October 19, 1984, 99 F.C.C. 2d 173, the Review Board affirmed United's disqualification. It reversed the ALJ, and granted the application of KIST, Corp. (KIST). Now before the Commission are Applications for Review of the Review Board's Decision, filed November 21, 1984, by Sunland, Bethel Broadcasting, Inc. (Bethel), Riverside Family Television, Inc. (Family), and United.[1] Also before the Commission are a Request for Oral Argument filed November 21, 1984, by Family,[2] and a Petition for Leave to Amend filed January 15, 1985, by United.[3]

2. We affirm the decision of the Review Board in all respects

[1] Oppositions to the Applications for Review were filed on December 21, 1984, by KIST, Sunland, Bethel, Riverside, and United. KIST filed four Oppositions, one relating to each Application for Review. On December 28, 1984, Sunland moved to strike KIST's multiple Oppositions for failure to comply with the page limitation of Section 1.115(f) of the Rules. On January 7, 1985, KIST filed an Opposition to the Motion to Strike. Section 1.115(f) does not prohibit the filing of multiple oppositions to multiple applications for review. The Motion to Strike will be denied.

[2] On November 28, 1984, KIST filed an Opposition to the Request for Oral Argument. The request will be denied. Family has not shown how oral argument would materially assist the resolution of this proceeding.

[3] On January 24, 1985, Family and Sunland filed Oppositions to the Petition for Leave to Amend. The Petition will be dismissed as moot.

except its analysis of the integration of ownership and management criterion concerning Sunland and its ultimate grant of KIST's application. As discussed below, while we do not disagree with the general principles articulated by the Board, we conclude that it erred in applying those principles to this matter.

3. The ALJ awarded Sunland comparative credit for the full-time integration of Andres Luis Soto, a 35% partner of Hispanic heritage, who is the proposed general manager of the station, and for the part-time integration of Jack Hodin, a 55% partner. *See* 99 F.C.C.2d at 221-24, 249.[4] The Review Board, finding that Mr. Hodin was the real party-in-interest behind Mr. Soto's partnership interest, denied Sunland credit for the integration of Mr. Soto into management of the proposed station. 99 F.C.C.2d at 189-92.

4. The Board pointed out that Mr. Hodin assumed the entire responsibility for financing Sunland's application, that he had contributed Mr. Soto's share of the initial capital as a loan and that if the application is not granted, Mr. Soto incurs no obligation to repay Mr. Hodin for such loan. The Board also noted that although Mr. Soto was obligated to contribute proportionately to finance the construction and operation of the station, Mr. Hodin would finance that contribution as well. When the station begins earning a profit, Mr. Soto would then become responsible for repaying these loans out of his share of the profits. Accordingly, the Board concluded that Mr. Soto had "no legal obligation or responsibility for the [Sunland partnership] entity." 99 F.C.C.2d at 190.

5. The Board correctly recognized that "financial investment .... is not necessarily the *sine qua non* of an ownership interest creditable for integration purposes." 99 F.C.C.2d at 190.[5] How-

[4] A 10% interest was formerly owned by another partner who has withdrawn from Sunland. That interest is now owned by Mr. Hodin. Sunland, however, is entitled to no integration credit for that additional 10% interest because of the Commission's prohibition against post-designation upgrading. *Birmingham Family Television, Inc.*, 91 F.C.C.2d 348 (Rev. Bd. 1982).

[5] We specifically reaffirm the policy set forth in *Minority Ownership in Broadcasting*, 92 F.C.D. 2d 849 (1982), in which we approved the applicability of our tax certificate and distress sale policies to certain limited partnership type arrangments. We recognized there the "unique nature of limited partnerships," but cautioned "that in order to avoid 'sham' arrangements, we will continue to review such agreements to ensure that complete managerial control over the station's operations is reposed in the minority general partner(s)." 92 F.C.D.2d at 855. Our conclusion here is consistent with that approach. We reject, as did the Board, the general proposition advanced by some parties here (*e.g.*, Tr. at 3480) that an essential element of meaningful minority participation is financial obligation.

ever, the Board nevertheless improperly elevated Mr. Soto's lack of immediate financial obligation to a decisive consideration. The pertenent consideration with respect to Mr. Soto's interest is whether there has been a good faith division of ownership and whether it appears from the record that Mr. Soto will have a legitimate interest and influence in the Sunland partnership to warrant our confidence that his participation in the station's operations will be consistent with the purposes behind the integration criterion. We find that the record here supports such a conclusion.[6]

6. For example, the Sunland partnership agreement, which the Board did not discuss, reposes real authority in Mr. Soto, establishing the *bona fides* of his 35% ownership interest. Not only will Mr. Soto be the full-time general manager of the station, but the partnership agreement provides him with negative control over major financial and other partnership decisions.[7] While Mr. Hodin's 55% interest is sufficient to provide him with *de jure* control over Sunland, the partnership establishes an intention to share his authority over the proposed station.[8] Accordingly, we

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[6] The Board incorrectly concluded that its rulings in *Henderson Broadcasting Co.*, 63 F.C.C.2d 419 (Rev. Bd. 1977) and *Berryville Broadcasting Co.*, 70 F.C.C.2d 1 (Rev. Bd. 1978), dictated a finding that Sunland was not entitled to credit for Mr. Soto's ownership interest in the partnership. As discussed below, the Sunland partnership agreement demonstrates to us, as the ALJ concluded, that it is a *bona fide* ownership arrangment and that recognizing Mr. Soto's 35% ownership would be consistent with the underlying objective of the integration credit. The facts of Sunland's ownership arrangment are clearly distinguishable from *Henderson* and *Berryville* to a decisionally significant degree. To use the Review Board's words, Mr. Soto will "have a palpable stake in [the] ultimate license" sufficient to ensure that he "will be scrupulously faithful to the public trust embodied in a license." 99 F.C.C. 2d at 186.

[7] Under the agreement, salaries of the partners are set by the partners' "unanimous agreement." In addition, Mr. Soto's consent is required for the partnership to "borrow or lend money, or make, deliver or accept any commercial paper, or execute any mortgage, security agreement, bond or lease, or purchase or contract to purchase, or sell or contract to sell any property for or of the partnership other than the type of property bought and sold in the regular course of business." In addition, the agreement provides that Mr. Soto must sign all checks withdrawing partnership funds. The partnership agreement also may be amended or the partnership dissolved only by unanimous agreement of the partners. *See* Family Exh. 9 at 4-6.

[8] In light of the clearly *bona fide* nature of the Sunland partnership agreement, we are unpersuaded that there is any relevance to the manner in which Mr. Hodin and Mr. Soto came to enter into the agreement. *See* 99 F.C.C.2d at 191. There may be some circumstances where such facts are relevant to our determination of the *bona fides* of ownership an arrangement. However, where there is a written agreement entered into demonstrating that there will be a sharing of ownership authority and no evidence that the agreement has been ignored by the parties, generalized allegations concerning the parties' lack of a previous relationship are unpersuasive.

conclude that Mr. Soto is the *bona fide* owner of a 35% interest in Sunland, and Sunland is entitled to integration credit for his full-time participation as the station's general manager.

7. By contrast, we find that the ALJ and the Board were correct in their conclusion that Ms. Kearney, the 95% stockholder in Riverside Family, is not the true and actual owner of the applicant and should be considered for integration purposes as having no ownership interest. 99 F.C.C.2d at 181-89, 228-33, 250-52. The record does not demonstrate that Ms. Kearney has been significantly involved in the Family application, or is likely to be involved in the affairs of the station as an owner.

8. We simply find it incredible that Mr. Dalton would make a gift of a 95% interest in this corporation to a near stranger. As noted earlier, we reject the proposition that Ms. Kearney's failure to make a financial contribution to the corporation or incur financial obligations, by itself, precludes a finding that she has an ownership interest creditable for integration purposes. The fact that Ms. Kearney is a minority female and area resident who would devote full time to working as the general manager of the station would enhance the corporation's chances of obtaining the license and could rationally explain Mr. Dalton's awarding her some interest.[9] We cannot believe that her contributions of this nature, however, can explain Mr. Dalton's, in effect, "giving away the store." We simply do not find it credible that a 5% interest in this corporation is sufficient to justify, for example, Mr. Dalton's guaranteeing a bank loan for $500,000 to the corporation, pledging to loan an additional $500,000 himself if necessary, and providing at least $70,000 to prosecute the application.

9. The difference between Family's proposal and other seemingly similar cases,[10] including the proposal of Sunland in this proceeding is more than a question simply of degree. In each of those other circumstances there was a basis to conclude that the ownership proposals reflected a *bona fide* business arrangement. *See* 99 F.C.C.2d at 184-86. Viewing the record as a whole here, we are unable to conclude that Riverside Family's proposal is a *bona fide* business arrangement.[11] We agree with the Review Board and

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[9] It is, of course, not improper for an applicant to structure its proposal in a manner that is believed most likely to prevail in a comparative proceeding *if* the proposal is *bona fide*. To the extent that the Board's opinion may be read to suggest otherwise (*e.g.*, 99 F.C.C.2d at 184), it is mistaken.

[10] *See, e.g., Alexander S. Klein, Jr.*, 86 F.C.C.2d 423 (1981); *Las Misiones de Bejar Television Co.*, 93 F.C.C.2d 191 (Rev. Bd. 1983); *San Joaquin Television Improvement Corp.*, 96 F.C.C.2d 594 (Rev. Bd. 1983).

[11] Among other factors, we specifically refer to the overwhelming percentage of

the Administrative Law Judge, therefore, that the real control of this applicant resides in Mr. Dalton and that Ms. Kearney should receive no ownership credit for integration purposes.

10. KIST is entitled to credit for the full-time integration of 37.49% of its ownership, enhanced by 29.6% local residence and 8.33% Hispanic ownership.[12] Bethel is entitled to credit for the full-time integration of 33% of its ownership enhanced by local residence. Sunland is entitled to credit for the full-time integration of Mr. Soto's 35% ownership interest and the part-time integration of Mr. Hodins 55% ownership interest. Sunland's integration is enhanced by Mr. Soto's Hispanic heritage and local residence. The quantitative differential between KIST's and Sunland's full time integration proposals is off set by the qualitative enhancement of Mr. Soto's 35% interest, the part-time integration of Mr. Hodin's 55% interest,[13] and the fact that Sunland proposes to integrate a majority of its stock ownership. Sunland's application is quantitatively and qualitatively superior to the applications of KIST, Bethal and Family.[14]

11. ACCORDINGLY, IT IS ORDERED, That the Application for Review, filed November 21, 1984, by Sunland Communications Company, IS GRANTED.

12. IT IS FURTHER ORDERED, That the Applications for Review, filed November 21, 1984, by Bethel Broadcasting, Inc., Riverside Family Television, Inc., and United American Telecasters, Inc., ARE DENIED.

13. IT IS FURTHER ORDERED, That the Motion to Strike,

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stock given by Mr. Dalton to Ms. Kearney, the fact that Ms. Kearney has exercised virtually no control over preparation of the application, that she has had no involvement in obtaining financing commitments, has contributed no capital to the enterprise and incurred no financial obligations, that there is no written agreement defining such things as how authority in the corporation will be exercised or how the loans will be repaid by the corporation, and finally the fact that to this point Mr. Dalton has clearly dominated the affairs of this corporation despite his minimal 5% stock ownership. We note in this regard the Judge's finding that the "shareholders and directors of Family [*i.e.* Mr. Dalton and Ms. Kearney] have repeatedly ignored the company's corporate form and violated its governing documents." 99 F.C.C.2d at 233. We lack confidence on this record that such practices will not continue if this corporation receives a license to operate a television station in Riverside.

[12] While KIST also proposes 4.17% female ownership, this factor would not alter the outcome of this case. In any event, the practice of giving credit for female status was set aside in *Steele* v. *FCC,* No. 84-1176 (D.C. Cir. August 23, 1985).

[13] Mr. Hodin will spend a minimum of 20 hr. a week at the proposed station "on a day to day basis." Sunland Exh. 4. *Cf. Bay Television, Inc.,* FCC 85-58 n. 2, released March 25, 1985.

[14] Family is entitled to no credit for integration and is subject to a slight demerit for the interest of its principal in a permittee of a UHF television station in Springfield, Missouri.

filed December 28, 1984, by Sunland Communications Company, IS DENIED.

14. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed January 15, 1985, by United American Telecasters, Inc., IS DISMISSED as moot.

15. IT IS FURTHER ORDERED, That the Request for Oral Argument, filed November 21, 1984, by Riverside Family Television, Inc., IS DENIED.

16. IT IS FURTHER ORDERED, That the Decision of the Review Board, FCC 84R-74, released October 19, 1984, 57 RR 2d 49, IS MODIFIED to the extent indicated herein, and in all other respects is AFFIRMED.

17. IT IS FURTHER ORDERED, That the Application (File No. BPCT-810720KL), filed by Sunland Communications Company for a construction permit for a new UHF Television Station at Riverside, California, IS GRANTED; and that the applications of KIST Corp. (File No. BPCT-810717KK), Bethel Broadcasting, Inc. (File No. BPCT-810720KM), Riverside Family Television, Inc. (File No. BPCT-810720KO), and United American Telecasters, Inc. (File No. BPCT-810720KQ), ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Cut-Off Rules
Financial Qualifications

Low power TV and TV translator applications and major amendments may only be filed during window filing periods when announced by Commission Public Notice. Low power TV and TV translator applicants need no longer submit any showing or certification concerning financial qualifications.
—*Lower Power TV*
MM Docket No. 83-1350

Site Availability
Television, Low Power
Translator, Need for

Various references and inconsistencies in low power TV rules are corrected. Television translator applications will not be given a processing priority. Low power TV and TV translator applicants will now be required to certify that they have reasonable assurance of site availability and submit information on the person contacted in order to obtain this reasonable assurance.
—*Low Power TV*
MM Docket No. 83-1350

FCC 84-492

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Low Power Television and Television Translator Service	MM Docket No. 83-1350

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 17, 1984; Released: November 19, 1984

BY THE COMMISSION: COMMISSIONER QUELLO ABSENT; COMMISSIONER DAWSON DISSENTING IN PART; COMMISSIONER RIVERA CONCURRING AND ISSUING A STATEMENT.

I. Introduction

1. In this proceeding the Commission is adopting further procedures to streamline and expedite the processing of low power television and television translator applications.[1] The *Notice of Proposed Rule Making* ("*Notice*"), 49 Fed. Reg. 908, released December 23, 1983, proposed three changes in the processing procedures for low power television and television translator applications. The proposals included: (1) modification of the cut-off rules to provide for a "window" or date certain for filing applications; (2) elimination of the requirement of filing financial information or certification with applications; and (3) the designation of television translators or certain types of television translators as a priority or separate class of service for processing purposes.

2. The Commission is adopting the first two proposals; i.e., to use a series of windows for filing applications and to eliminate the requirement to file any financial information or certification. The new window filing procedure will also apply to applications now properly on file but not cut-off or linked to a cut-off application, in the manner discussed in paragraph 5, *infra*. The changes in the financial requirements will apply retroactively to all pending as well as new applicants. However, for reasons that are more fully detailed herein, the Commission will not separate the processing of television translator applications from low power television applications nor will it afford a priority to television translator applications over low power television applications.

3. A wide variety of comments were received in this proceeding from full-service television station licensees, television translator licensees and applicants, trade associations, educational institutions, low power television applications and individuals. There was general support for the first two proposals. However, comments on the translator priorty proposal were more diverse. Full-service television station licensees generally advocated priorities for fill-in translators;[2] educators generally advocated priorities for noncom-

[1] The modified rules are contained in Appendix A.

[2] Fill-in translators are used to provide service to areas within the city grade, Grade A or Grade B contours of a full-service television station, that do not receive adequate service due to terrain shielding.

mercial translators; television translator licensees generally advocated priorities for all television translator applications; and low power television applicants opposed any priority for translators. All comments and reply comments were given careful consideration.[3]

II. Modification of Cut-Off Rules

4. Under the current procedure used by the Commission, applications for low power television and television translator stations which have been found acceptable for filing are placed on an A cut-off list. This Public Notice invites competing applications until a specified cut-off date approximately thirty days later. Due to various factors, including the significant reduction and simplification of the information required in applications and the freeze on the filing of new low power television and television translator applications, almost all applications appearing on recent cut-off lists have generated numerous competing applications. The March 8, 1984, cut-off list, which contained approximately 3,400 applications, generated approximately 25,000 competing applications. This processing procedure entails administrative delay which has impeded the implementation of the low power television service and the expansion of the television translator service. Use of the cut-off lists requires double processing of all applications placed on cut-off lists. First, an application must be processed to determine whether it meets the Commission's technical requirements and whether it will cause interference to licensed or pending but cut-off facilities. If an application passes this initial evaluation, it is then placed on a cut-off list. After the cut-off date, the application must be processed again to determine whether any competing applications were filed by the cut-off date, in order to identify all mutually exclusive applications for lottery. This redundant processing is an inefficient use of the Commission's limited resources.

5. The Commission herein is adopting modified rules which eliminate the use of cut-off lists for the processing of low power television and television translator applications. As proposed in the *Notice*, filing windows will open no less than thirty days after Public Notice of the window is given by the Commission. The Public Notice will specify how long the filing window will remain open, generally five work days.[4] Windows will be opened as

[3] The comments and reply comments are summarized in Appendix B.

[4] The Commission intends to retain some discretion as to the timing of the

frequently as possible in order to provide various opportunities for filing applications, but consistent with the Commission's need to maintain an orderly processing procedure and our desire to use our resources efficiently. Applications filed during a window will be made available for public inspection after they have been entered into the Broadcast Application Processing data base. Applications filed during a window, which are found acceptable, will be either placed on a proposed grant list pursuant to Section 73.3572(f)(4) of the Commission's Rules or grouped for a lottery with other mutually exclusive applications filed during that window and placed on a lottery public notice pursuant to Section 73.3572(f)(2) of the Commission's Rules. In order to expedite the processing of properly filing pending applications that have not been cut-off, such applications will be cut-off on the last day of the first national window filing period. Applicants that intend to file competing applications against these properly filed pending applications that have not been cut-off and are not linked to any cut-off applications, may file during the appropriate window filing period. Although a list of these applications will not be issued by the Commission, they may be identified by reference to the Commission's engineering data base.

6. Filing windows will expedite the processing of applications and will help to reduce the processing delays encountered by both television translator and low power television applicants. Use of filing windows for low power television and television translator applications will do much to eliminate the practice of one applicant copying another applicant's information and submitting it as its own. Filing windows should also eliminate the deliberate creation of mutually exclusive situations by over-filing on applications as they appear on cut-off lists. Over-filing has been a source of frustration to applications who have diligently prepared an application and waited years only to have numerous competing applications filed on the cut-off date. Filing windows will provide an equal opportunity to all potential applicants to file new applications and will not disadvantage the first-filed application as sometimes occurred in the past. In addition, because of the contour overlap rules used to determine interference for low power television and television translator applications, unique and complex linkage situations often develop. Hundreds of applications may be linked together because of potential interference as

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windows and the periods they will be open. This discretion is necessary in order to respond to changing circumstances in the processing of low power television and television translator applications.

defined by the Commission's Rules. This extensive linkage is extended by the doctrine of *Kitty Hawk Broadcasting*, 7 FCC 2d 153 (1967), which holds that an applicant must file by a cut-off date even though not mutually exclusive with an applicant on the cut-off list or risk being precluded due to the filing of an intervening application that links the applicant to the cut-off list. Thus, extensive linkage coupled with the holding of *Kitty Hawk Broadcasting* dictates that prudent applicants file on virtually every cut-off list in order to avoid being precluded from filing by other adjacent applications to which they are linked.

7. We have found no legal impediment to the use of filing windows either in legislative provisions or in judicial decisions. Neither Section 309(b) of the Communications Act of 1934, as amended, nor *Ashbaker v. FCC*, 326 U.S. 327 (1945), requires the Commission to use cut-off lists in processing applications. Section 309(b) requires the Commission to give public notice of the acceptance for filing of an application 30 days prior to its grant. This requirement will remain. Moreover, the Supreme Court in *Ashbaker v. FCC*, 326 U.S. at 333, n. 9., recognized that the Commission could establish dates for the filing of conflicting applications. *See also Radio Athens, Inc. v. FCC*, 401 F.2d 398 (D.C. Cir. 1968). In *Century Broadcasting Corp. v. FCC*, 310 F.2d 864 (D.C. Cir. 1962), the flexibility of the Commission in fashioning procedural "housekeeping" rules was recognized. While the courts have traditionally required the Commission's cut-off dates to "fairly advise prospective applicants of what is being cut-off by the notice," *Ridge Radio Corp. v. FCC*, 292 F.2d 770, 773 (D.C. Cir. 1961), the filing windows being adopted herein meet this requirement. Prospective applicants will be notified by a general Public Notice that they must file their application during the specified filing period in order to receive consideration along with any other mutually exclusive applications filed during the same filing period.

8. Certain parties have commented that use of filing windows will engender a land rush mentality and stimulate the filing of applications by parties with no plans to use the channels for which they have applied. However, once the remaining Tier II and III locations are opened for filing, we anticipate massive filings for available channels regardless of whether cut-off procedures or filing windows are used. It has been argued that cut-off lists have been used by some over-filers to target other applicants that might be willing to buy them out. If this is so, without cut-off lists these frequency speculators will be less inclined to file

applications since there will be no readily apparent party with whom to negotiate a settlement or to whom a construction permit may later be sold.

9. Comments were requested on appropriate groupings for given window periods. Of the responsive comments, none presented viable plans for dealing with the prejudice to adjacent groups due to daisy chain effects[5] which would result from any given grouping. In certain areas such as Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands, physical distance may allow for separate windows. However, except in isolated situations where it is apparent that no prejudice will occur to adjacent areas, we will open the filing windows for all available channels throughout all of the country. This procedure will allow many applications in rural areas to be processed expeditiously since they may generally br unopposed. Television translator organizations will be able to apply for the channels which they need to provide service without the fear of inviting competing applications when they appear on a cut-off list. In addition, the filing window can be used by existing stations to file major change amendments. We feel that this approach will do much to eliminate the delay and over-filings that television translator and low power television applicants have faced since the implementation of the low power television service. In addition, we will continue our policy of expediting the processing of applications which are not mutually exclusive.

III. Financial Information

10. For the reasons stated in the *Notice* and for the reasons stated herein, the requirement that an applicant for a low power television or television translator authorization file any information or certification concerning its financial qualifications is being eliminated. Thus, completion of Section III, Financial Qualifications, on FCC Form 346 will no longer be required of low power television and television translator applicants. Because a strict one-year construction period is applied to low power television and television translator authorizations, a mechanism for post-lottery enforcement is in place that will provide for termination of

[5] Because of the contour overlap interference criteria used for low power television and television translator applications, daisy chains of mutually exclusive applications may extend for hundreds of miles. Daisy chains occur when an application is mutually exclusive, i.e., would cause interference, with an application in an adjacent community, which is mutually exclusive with an application in another adjacent community, and so on.

authorizations won without appropriate financial backing. Moreover, since compliance will now be monitored post-lottery, it is in the public interest to have the changes apply retroactively to all pending as well as new applicants.

11. We believe that, in compliance with the statutory mandate of the Communications Act of 1934, as amended, the Commission may refrain from soliciting financial information from an applicant. Pursuant to Section 308(b) "all applications for station licenses. . . . shall set forth such facts as the Commission by regulation *may* prescribe as to citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station. . . ." 47 U.S.C. § 308(b) (1981). (Emphasis added.) The United States Court of Appeals for the Distrct of Columbia has confirmed that the Commission's inquiry into the financial qualifications of its applicants is discretionary.

> Also, the provisions of 47 U.S.C. 308(b) authorizing consideration of factors of 'citizenship, character and financial, technical and other qualifications' is not violated because it does not require scrutiny of an applicant's financial fitness. That section leaves it within the discretion of the Commission to decide which facts relating to such factors it wishes to have set forth in applications. Since this leaves the Commission free to have no facts set forth on any of these matters, if it finds such action appropriate, it follows necessarily that the Commission is not required to consider financial fitness if it deems it irrelevant to its regulatory scheme. [*National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 645 (D.C. Cir. 1976).]

12. We further believe that in the case of low power television and television translator service we no longer need information on the financial qualifications of an applicant, or even a financial certification from an applicant, in order to make the public interest determination whether to grant an application as required by Section 309(a) of the Communications Act of 1934, as amended. 47 U.S.C. § 309(a) (1981). Thus, we believe that we can discharge our statutory obligation with a simplified low power television and television translator application form which does not elicit information or a certification on the financial qualifications of an applicant.

IV. Separation and Priority for Television Translators

13. The Commission also requested comments on various alternative proposals to designate television translators as a priority or separate class of service for processing purposes with low power television secondary to it. Since television translator and

low power television stations share the same frequencies, and since on a technical basis the operation of the stations is nearly equivalent, they are now processed together.

14. Since the establishment of the low power television service the Commission has attempted to balance two principal goals for the provision of television service. One of these goals is to recognize the contribution that the traditional translator has played in providing television service to areas where direct reception of full-service television stations is hindered by distance or intervening terrain barriers. To promote this goal, we have avoided rules that would make translator service more difficult to provide, especially in isolated rural areas where the need for television service is greatest. A second goal is to provide maximum flexibility for new originating services to come into being, easily and at low cost, and to provide for expansion of existing translator service. *Notice of Proposed Rule Making in Docket 78-253*, 82 FCC 2d 47 (1980) at paragraph 6. Such flexibility allows low power television stations to develop programming tailored to the needs and interests of the local community.

15. The Commission's attempts to balance these sometimes competing goals have included various actions. The Commission first attempted to initiate low power television service by accepting television translator applications with waiver requests to originate programming, under interim processing procedures established in 1980. *Interim Processing Procedures*, 48 RR 2d 291 (1980). These interim processing rules were designed to allow the continued processing of television translator applications while at the same time accepting new low power television applications for filing. It was believed that a total freeze on the acceptance and processing of television translator applications would not be in the public interest. At the same time, processing of only television translator applications during the interim period, when the low power television rule making was pending, would have seriously prejudiced the ability of low power television applicants to compete for available channels upon approval of the service.

16. During the interim period, the overwhelming demand for low power television stations was manifested in the thousands of low power television applications received by the Commission. The large number of applications threatened the ability of the staff to provide orderly and expeditious processing. Therefore, a series of partial and eventually total freezes was implemented in order to reduce the flow of applications to manageable levels. The partial

freezes were designed to allow low power television and television translator applications to be filed first in the most rural and underserved areas. This design facilitated the two goals by allowing the continued filing of television translator applications in the areas traditionally served by translators and also allowing for the filing of low power television applications. Although the "total" freeze on new and major change applications which has been in effect since September 15, 1983, has been disruptive to the plans of some potential applicants, it has allowed the Commission to implement the lottery mechanism and make strides in processing both television translator and low power television applications.[6]

17. We have determined, based on our experience and the comments received in this rule making, that the public interest will best be served by the expeditious processing of all applications and not by choosing one group of applicants to favor over another. We have not been persuaded that expedited processing of television translator applications must come at the expense of providing maximum flexibility for existing television translator stations that want to switch to low power television status and new low power television stations, that can provide a local programming outlet beyond the capability of a television translator. Thus, we will continue to balance these two goals by seeking to accommodate both television translator and low power television applicants.

18. Under the Commission's rules a low power television station may operate as a television translator, rebroadcasting the programming of a full-service television station.[7] Thus, any attempt to give a processing priority to television translators should take into consideration all the low power television applicants that propose to operate as television translators. A provision would have to be made for giving the same priority to thse low power television applicants. New restrictions on programming changes for low power television and television translator stations would

[6] Under the current freeze only applications submitted in response to cut-off lists, or for television translator stations bumped from channels 70 through 83 due to land mobile radio use, may be filed. As noted above, the Commission has received more than 30,000 low power television and television translator applications in response to cut-off lists.

[7] The basic distinction between low power television and television translator stations is that television translators are limited to rebroadcasting the signals of full-service television stations and cannot do more than 30 seconds of local origination programming per hour. Low power television stations may carry any type of broadcast programming and do any amount of local origination programming.

be necessary to maintain the integrity of this television translator priority. Significantly, restrictions on switching from television translator to low power television status would unduly penalize television translators that desire to do small amounts of local origination programming. The low power television service was initially designed to allow existing translators to provide some local origination programming. This flexibility is still a valid goal and should not be restricted. Since low power television licensees may operate as translators and also originate programming, hybrid systems have become a popular method of operation. Low power television stations are operating as translators for a good part of the time, with the institution of some local origination programming as appropriate for a particular area. Despite the fact that low power television stations are commonly thought as of stations that engage in continuous program origination, many communities, particularly the smaller ones, lack the resources to sustain such a station. However, some of these communities may desire local programming on a limited scale. Local news, sports events and public affairs programs are now carried on an occasional basis by low power television stations that were previously strictly limited to rebroadcasting by the Commission's television translator rules. The elimination of this flexibility, which would be required by priority processing, would be destructive to the further development of these hybrid stations. In addition, relaxation of the origination requirements has permitted former exclusively translator operations to convert to low power television and to establish an economic base in a particular community by selling advertising time. The income so generated is used to finance the translator portion of the operation. Thus, the priority now proposed for translators may be short sighted. Low power television as a broadcast service is in its infancy and should be given an opportunity to develop without further restrictions.

19. In any event, the primary complaint of those parties advocating a priority for television translators is that processing in combination with low power television applications has caused delays in the granting of television translator applications. The rule changes being adopted herein, particularly the use of window filing periods, will substantially reduce the processing time for television translator applications without providing a specific priority for such applications. The use of windows will eliminate the practice of over-filing competing applications on television translator applications. With fewer mutually exclusive situations,

the applications which are filed may be processed more expeditiously. Therefore, we believe that expeditious action on television translator applications may be provided without the need to designate television translator applications as a priority.

20. For the most part, the commenting parties have focused on programming related arguments. The parties have attempted to show that television translator stations are entitled to a preference because they rebroadcast the signal of a full-service television station, which has more stringent programming requirements than low power television stations. It is argued that full-service television programming guidelines will insure that the signals rebroadcast by television translators will be superior to low power television programming. However, on June 27, 1984, the Commission adopted *Deregulation of Commercial Television*, 56 RR 2d 1005 (1984), eliminating formal programming guidelines for full-service commercial television stations. In addition, the television translator station will not be able to respond to local community needs unless the primary station, which the translator is rebroadcasting, determines that it will respond to the needs of the translator community.[8] Since the primary station is often located a considerbly distance from the translator station, and since a primary station may be carried on many translator stations in many diverse communities, it is impossible to determine that the needs and interest in all of the translator communities will be adequately served by the one primary station.

21. Most importantly, since low power television stations are authorized to do local program origination while television translators can only rebroadcast the signal of a full-service television station, there is a much greater probability that low-power television stations will establish a local presence, *e.g.*, a local studio, and be more responsive to community needs and interests. In view of the foregoing, we find no basis for determining that television translator applications are entitled to a preference over low power television applications based on claims of superior programming.

22. It has also been suggested that a priority be afforded to television translators carrying various types of primary stations providing network programming, independent programming, and

[8] Some of the commenting parties are UHF licensees that transmit subscription programming for a significant portion of their broadcast time. Under these licensees' proposal, television translators carrying this subscription programming would be entitled to the same processing priority as any other television translator carrying non-subscription programming.

public television or noncomercial programming. Certain parties suggest that each community should be served by the three television networks, two independent stations and public television before low power television applications are accepted. However, support of a priority system based on a preference for certain types of programming runs counter to past Commission decisions. For example, in the reconsideration of the *Low Power Television Report and Order*, 53 RR 1267 (1983) ("*Reconsideration*"), the Commission stated:

> [T]here is no basis for preferring Neighborhood's programming proposals over any others. The *Report and Order* imposed a minimum of program content regulations on low power television stations so that they may be responsive to marketplace conditions. *Report and Order*, at 21490. Since we favor no particular programming, we cannot favor Neighborhood's plan over other proposals. [*Reconsideration*, 53 RR 2d at 1277.]

Just as it was not appropriate to take certain programming proposals into consideration in the *Reconsideration* it would also not be appropriate now to grant priorities to translator applications based on programming proposals. By affording a priorty to translators the Commission would, in effect, be stating that the rebroadcast of programming by a translator should be preferred over the local origination outlet of a low power television station. We believe that this decision is more appropriately made in the marketplace and not by the Commission.

23. In addition to the above, there are procedural difficulties in providing for a priority for television translators. If television translator applications were now given a processing priority, applicants for low power television stations might file for television translators in order to secure the priority.[9] This would only exacerbate processing delays. Even if the Commission made the change from television translator to low power television service a major change, it may not be sufficient to deter mass filings of applications for television translator service. Since, as suggested in the comments, speculative filers often have no intention of utilizing the channels for which they apply, a limitation on the use of the channel would not be an effective deterrent. The speculator still would have various options including: (1) being paid to dismiss its application by a legitimate translator applicant; (2) selling its authorization to a legitimate translator operator; and (3) retaining its authorization on the channel

[9] Currently a television translator station may change to a low power television station by filing a letter of notification with the Commission.

anticipating that the Commission will again change its rules. Proposals such as requiring a television translator applicant to submit written authority to rebroadcast the proposed primary station signal or requiring a television translator station to operate as a translator for a fixed number of years, also would not appear to solve the processing delays.

24. Designating certain classes of television translator applicants as a priority for processing purposes presents even more problems. Various commenters have suggested providing an absolute priority for translator applications to fill in the City Grade, Grade A or Grade B contour of full-service television stations. However, the Commission would be required to develop standards for determining whether certain areas within a specified contour of a full-service station were in fact not served. These technical quantification standards would be difficult, if not impossible, to develop and administer. Such priorities would require manual staff processing of applications and consideration of terrain shielding, which the Commission has previously rejected. No commenters advocating a translator priority addressed these difficult problems. Additionally, no comments were filed as to how to deal with the equally difficult situation where the unserved area is on the edge of the primary station's specified contour, and the priority translator is used to extend coverage rather than fill in unserved areas. Most commenters also advocated use of a full-service station's Grade B contour as the relevant coverage area. Under the proposed procedure a full-service television station would be entitled to an absolute preference for a television translator station that would serve any unserved area within the station's Grade B contour even if the television translator significantly extended the full-service station's signal into areas outside the Grade B contour and even if it extended the coverage of the full-service station into totally new communities. Full-service television stations might find some areas within their Grade B contours that would qualify for a television translator priority, but that would be used primarily to extend coverage into new areas. Grants of such applications would, of course, preclude the filing of conflicting low power television applications in those areas.

25. The arguments of the various educational institutions, and noncommercial broadcasters echo the previous claims of the National Association of Public Television Stations ("NAPTS") in its Petition for Further Reconsideration of the *Low Power Television Report and Order*, 51 RR 2d 476 (1982), and *Reconsid-*

eration, 53 RR 2d 1267 (1983). The Commission, in its *Memorandum Opinion and Order*, FCC 83-486 (released October 27, 1983), considered the argument that elimination of the priority previously accorded television translator rebroadcasts of noncommercial programming seriously impairs the ability of noncommercial television to extend its services to remote areas of the country. Noncommercial broadcasters previously had an absolute priority for television translators on channels reserved for full-service noncommercial applicants in the Commission's table of television assignments. The Commission's rationale for eliminating the former noncommercial translator priority applies with equal vigor to the present proposal to give a priority to noncommercial applicants on all translator channels. We are not persuaded that there is an immediate risk of spectrum shortages which will curtail expansion of public television service to remote and unserved areas of the country. We also would note that numerous low power television applicants have proposed noncommercial service. Moreover, as explained in paragraph 6, the use of filing windows should also reduce processing delays and mutually exclusive situations for noncommercial translator applicants.

26. After giving careful consideration to the various proposals for affording television translator applicants a processing priority over low power television applicants, we have reached the conclusion that the public interest will be served by maintaining our present balance between the goals of maintaining television translator service and encouraging new low power television service. Adoption of television translator priorities would require the formulation of new regulatory restrictions that would severely impair the present flexibility for providing new originating services. The ability of licensees, including television translator licensees, to respond to marketplace conditions would be significantly curtailed. Finally, implementation of the low power television service would be substantially delayed.

V. Terrain Shielding and Site Availability

27. The *Notice* invited comments on any other procedures that would effectively expedite consideration of low power television and television translator applications. The most frequently proposed procedural change was for the Commission to take into consideration terrain shielding when calculating anticipated interference. It was contended that consideration of terrain shielding would eliminate many situations of apparent mutual exclusivity.

Many commenters argued that the Commission's policy does not fully take into account all terrain factors and has inhibited the development of television translator and low power television service in many mountainous areas of the country. It was contended that processing applications without consideration of terrain shielding causes an inefficient use of radio spectrum since it precludes the use of many channels in locations where the Commission's theoretical analysis indicates interference would occur. Although we are sympathetic to the concerns of the commenting parties, we will not make the procedural changes requested. As stated in the *LPTV Report and Order* and *Reconsideration*, there is no universally accepted method of predicting the effects of terrain shielding. Moreover, it is far beyond our staff capacity to evaluate individually thousands of terrain shielding claims. We continue to believe that for the Commission to become embroiled in terrain shielding disputes at this time would frustrate our efforts to expedite grants of television translator and low power television applications. However, when the flow of applications diminishes it may be appropriate to reconsider the terrain shielding issue.

28. Another proposal which was made by many commenting parties is to require that some evidence of site availability be submitted with all applications for low power television and television translator service. It was suggested that the requirement to file some evidence of site availability would limit the number of frivolous applications filed with the Commission. Some commenters suggested that applicants be required to submit written authorization from the site owner evidencing a willingness to make the site available. Other commenters suggested that an applicant be required to certify that it has contacted the site owner and has obtained reasonable assurance of the site availability.

29. The Commission has held that although an applicant need not have a binding agreement or absolute assurance of a proposed site, an applicant must show that it has obtained reasonable assurance that its proposed site is available. Some indication by the property owner that he is favorably disposed toward making an arrangement is necessary. A mere possibility that the site will be available will not suffice. *William F. Wallace and Anne K. Wallace*, 49 FCC 2d 1424 (Rev. Bd. 1974). The specification of a site is an implied representation that an applicant has obtained reasonable assurance that the site will be available. A failure to inquire as to the availability of a site until after the application is

filed is inconsistent with such a representation. See *William F. Wallace, supra.* In view of this longstanding Commission requirement, we are adding a question to FCC Form 346 which will require an applicant to certify that it has obtained reasonable assurance from the property owner that the site will be available.[10] The certification will include a reference to the name and location of the person contacted.

30. This certification and related information is necessary for applications in the low power television and television translator service for several reasons. It appears that a significant number of applicants may submit applications without first determining if they have reasonable assurance that the site will be available. This situation creates processing delays for all applicants because the staff must consider and process many applications that are not complete since they do not have reasonable assurance of a site. To date, approximately 28 percent of the low power television lotteries have drawn petitions to deny against the tentative selectee. Excluding the petitions to deny filed by Neighborhood TV Company based on its court appeal[11], 65 percent of the petitions to deny raise issues of site availability. In 40 percent of the cases where site availability is raised we have found the tentative selectee's application deficient in this respect and dismissed its application. Another 20 percent of the cases have raised site issues that require the solicitation of further information by the staff. Thus, site availability is the major basis for challenging lottery winners and results in the dismissal of a significant number of lottery winners. Further, when a construction permit is granted to an applicant that does not have a site and thus does not build a station, service to the public is delayed and a qualified applicant may be prevented from obtaining an

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[10] The applicant certifies that it has contacted an authorized spokesperson for the owner of the rights to the proposed transmitter site and has obtained reasonable assurance that the site will be available for its use if this application is granted.__Yes__No The person is ___who can be contacted at the following address and telephone number_____.

[11] The *LPTV Report and Order*, which promulgated the low power television rules, was appealed by Neighborhood TV Company, Inc. Neighborhood TV Company, Inc. argued that television translator applications should have been processed separately from low power television applications. Appellant maintained that applications that were on file at the time the low power television service was initiated were prejudiced by the Commission's decision to process low power television and television translator applications together. The Court of Appeals recently denied Neighborhood's appeal. *Neighborhood TV Company, Inc. v. FCC*, No. 83-1635 (D.C. Cir. Aug. 17, 1984).

authorization and providing a needed service.[12] Therefore, in order to maintain the integrity of the application process and in order to expedite processing of qualified applicants, we are adopting this site certification requirement. We feel this action will not be burdensome on applicants, since our current policy already requires that they obtain reasonable assurance that the proposed site is available. The only new requirement is that the applicant now verify this action on the application form.

VI. Other Matters

31. We are also adopting various "housekeeping" rule changes herein which are necessary to clarify and conform various rule sections and delete inapplicable rules. All of the rule changes adopted herein are reflected in Appendix A.

32. Section 73.3516(c) is being modified to remove a provision which provided for the filing of a television translator application on a channel on which a UHF full-service station had been authorized but not yet placed into operation. This section, which was inadvertently not changed at the time the low power television rules were adopted, eliminates an inconsistency in the Commission's Rules.

33. In Section 73.3572(f)(2), certain minor clarifications are being made concerning the 30-day Public Notice announcing lotteries. Minor changes are made in Sections 73.3580(d)(1) and 74.784 distinguishing the local public notice and station identification requirements for low power television licensees that are locally originating programming as defined by Section 74.701(h) of the Commission's Rules. Section 73.3584(c) is modified to make it clear that 30 days is allowed for filing petitions to deny applications which appear on a proposed grant list. Section 74.735(c)(4), requesting certain technical information, is being deleted since the information requested is no longer necessary. Section 74.780 is being updated to specify correctly the various broadcast regulations which apply to low power television and television translator stations. Section 74.763(b) is added to conform to the full-service television requirements for reporting

[12] Based upon our experience, applicants without the site specified in the application often request to move to another site after grant of the construction permit. This is usually a major change. Pursuant to Section 73.3572 of the Commission's Rules, a major change requires the assignment of a new file number to an application and reprocessing of that amended application which, as far as the technical proposal is concerned, entails the same processing as a new application.

discontinuance of operation. A minor clarification is being made in Section 73.3564 to reiterate the complete and sufficient standard for acceptance of low power television and television translator applications and conform this section with Section 73.3591 and the *Low Power Television Report and Order*, 51 RR 2d 476, 502 (1982). Various other minor reference and inconsistencies[13] have been corrected in the following: Sections 73.3540(c)(1), 74.765(b), and 74.783.

34. Pursuant to Section 605 of the Regulatory Flexibility Act, 5 U.S.C. § 601 *et. seq.*, the Commission certifies that the action proposed will not have a significant economic impact on a substantial number of small entities. The rule revisions are designed to simplify and expedite processing procedures.

VII. Conclusion

35. In view of the foregoing and pursuant to Sections 1, 3, 4(i) and (j), 303, 308, 309 and 403 of the Communications Act of 1934, as amended, it is hereby ordered that the action taken herein and the amendment of the Commission's Rules as set forth in Appendix A, are effective December 26, 1984.

36. It is further ordered, that revised FCC Form 346 is amended, effective upon approval by the Office of Management and Budget.

37. It is further ordered that this proceeding is terminated.

38. For further information concerning this proceeding contact Larry A. Miller, Mass Media Bureau, (202) 632-3894.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

*Appendix B-may be seen in FCC's Dockets Branch, 1919 M Street, N.W., Wash., D.C.

Appendix A

Part 73-Radio Broadcast Services

1. 47 CFR 73.3516 is amended by revising paragraph (c) to read as follows:

§ 73.3516 Specification of facilities.

* * * * *

[13] A further inconsistency in paragraph 47 of the *Reconsideration of the LPTV Report and Order*, 53 RR 2d 1267 (1983), is hereby corrected. Major changes include substantial changes in an applicant's ownership as defined in Section 73.3572.

(c) An application for a construction permit for a new broadcast station, the facilities for which are specified in an outstanding construction permit or license, will not be accepted for filing.

* * * * *

2. 47 CFR 73.3540 is amended by removing paragraph (c)(1).

3. 47 CFR 73.3564 is amended by revising paragraphs (a) and (c) and adding new paragraph (d) to read as follows:

§ 73.3564 Acceptance of applications.

(a) Applications tendered for filing are dated upon receipt and then forwarded to the Mass Media Bureau, where an administrative examination is made to ascertain whether the applications are complete. Except for low power TV and TV translator applications, those found to be complete or substantially complete are accepted for filing and are given file numbers. In the case of minor defects as to completeness, the applicant will be required to supply the missing information. Applications that are not substantially complete will be returned to the applicant. In the case of low power TV and TV translator applications, those found to be complete and sufficient are accepted for filing and are given file numbers. Low power TV and TV translator applications that are not complete and sufficient will be returned to the applicant.

* * * * *

(c) At regular intervals the FCC will issue a Public Notice listing all applications and major amendments thereto which have been accepted for filing. Pursuant to §§ 73.3571(c), 73.3572(c) and 73.3573(d), except in the case of low power TV and TV translator applications, such notice shall establish a cut-off date (no less than 30 days from the date of issuance) for the filing of mutually exclusive applications and petitions to deny. However, no application will be accepted for filing unless certification of compliance with the local notice requirements of § 73.3580(h) (Local public notice of filing of broadcast applications) has been made in the tendered application.

(d) Notwithstanding the provisions of this Section and § 73.3572, new and major change applications for low power TV and TV translator stations will be accepted only on the date(s) specified by the FCC in a Public Notice.

4. 47 CFR 73.3572 is amended by revising paragraphs (a) and (f) to read as follows:

§ 73.3572 Processing of TV broadcast, low power TV, and TV translator station applications.

(a) Applications for TV stations are divided into two groups:

(1) In the first group are applications for new stations or major changes in the facilities of authorized stations. A major change for TV broadcast stations authorized under this part is any change in frequency or community of license which is in accord with a present allotment contained in the Table of Assignments (§ 73.606). Other requests for change in frequency or community of license for TV stations must first be submitted in the form of a petition for rulemaking to amend the Table of Assignments. In the case of low power TV and TV translator stations

authorized under Part 74 of this chapter, a major change is any change in:

(i) Frequency (output channel) assignment;

(ii) Transmitting antenna system including the direction of the radiation, directive antenna pattern or transmission line;

(iii) Antenna height;

(iv) Antenna location exceeding 200 meters; or

(v) Authorized operating power.

However, if the proposed modification of facilities, other than a change in frequency, will not increase the signal range of the low power TV or TV translator station in any horizontal direction, the modification will not be considered a major change. Provided further that the FCC may, within 15 days after the acceptance of any other application for modification of facilities advise the applicant that such application is considered to be one for a major change and therefore subject to the provisions of §§ 73.3580 and 1.1111 pertaining to major changes.

* * * * *

(f) Processing of applications for low power TV and TV translator stations.

(1) Applications for low power TV and TV translator stations will be processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and will be drawn by the staff for study, the lowest file number first. The FCC will specify, by Public Notice, a period for filing low power TV and TV translator applications. The filing period will open no less than 30 days after release of the Public Notice and remain open for at least five work days.

(2) Subsequently, the FCC will release a Public Notice: (i) establishing a date, time, and place for a public lottery; (ii) accepting for filing mutually exclusive applications which were timely filed during the filing period previously specified by the FCC; (iii) designating the listed mutually exclusive applications for public lottery pursuant to the procedures set forth in § 1.1601 *et seq.*; and (iv) describing each applicant's certified preferences and selection probabilities and assigning to each applicant a number block. (It will be the applicant's responsibility to notify the FCC, within 30 days of the release of the Public Notice, of any omissions of applications or clerical or mathematical errors in preferences or probabilities. The FCC will not entertain appeals involving these matters if timely notification to the FCC has not been made.) If necessary, the FCC will release subsequent Public Notices correcting only clerical or mathematical errors and including any previously omitted mutually exclusive applications. The public lottery pursuant to the procedures set forth in § 1.1601 *et seq.*, will be held no less than 30 days subsequent to the initially released Public Notice announcing the lottery. Subsequent to the lottery, the FCC will release a Public Notice announcing the selection of a tentative selectee resulting from the lottery and providing an opportunity for the filing of Petitions to Deny pursuant to the requirements of § 73.3584(c). If, upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of a tentative selectee's application, the same will be granted. Those applications which, due to the lottery, are no longer mutually exclusive with other applications will be announced in a Public Notice proposing the grant of those applications and providing an opportunity for the filing of Petitions to Deny pursuant to § 73.3584(c). Groups of

mutually exclusive applicants remaining after a lottery will be designated for lottery. Applications which are not grantable due to mutual exclusivity with the permitee selected by lottery will be dismissed.

* * * * *

(4) The FCC will periodically release a Public Notice accepting for filing and proposing for grant those applications which were timely filed during the filing period specified by the FCC in a Public Notice for filing low power TV or TV translator applications, but which are not mutually exclusive with any other application, and providing an opportunity for the filing of Petitions to Deny pursuant to § 73.3584.

5. 47 CFR 73.3580 is amended by revising paragraphs (d) and (g) to read as follows:

§ 73.3580 Local public notice of filing of broadcast applications.

* * * * *

(d) The licensee of an operating broadcast station who files an application or amendment thereto which is subject to the provisions of this section must give notice as follows:

(1) An applicant who files for renewal of a broadcast station license, other than a low power TV station license not locally originating programming as defined by § 74.701(h), FM translator station, FM booster station or a TV translator station license, must give notice of this filing by broadcasting announcements on applicant's station. (Sample and schedule of announcements are below.) Newspaper publication is not required. An applicant who files for renewal of a low power TV station license not locally originating programming as defined by § 74.701(h), FM translator station, FM booster station or a TV translator station licensee will comply with (g) below.

* * * * *

(g) An applicant who files for an authorization, major modification, assignment, transfer or renewal, or a major amendment thereto, for a low power TV, TV translator, FM translator, or FM booster station must give notice of this filing in a daily, weekly or biweekly newspaper of general circulation in the community or area to be served. (An applicant who files for renewal of a low power TV station locally originating programming as defined by § 74.701(h) must give notice pursuant to (d)(1) of this section.) The filing notice will be given immediately following the tendering for filing of the application or amendment, or immediately following notification to the applicant by the FCC that public notice is required pursuant to §§ 73.3572, 73.3573, or 73.3578.

(1) Notice requirements for these applicants are as follows:

(i) In a newspaper at least one time; or

* * * * *

6. 47 CFR 73.3584 is amended by revising paragraph (c) to read as follows:

§ 73.3584 Petitions to deny.

* * * * *

(c) In the case of applications for new low power TV or TV translator stations, or for major changes in the existing facilities of such stations, any party in

interest may file with the FCC a Petition to Deny any application (whether as originally filed or if amended so as to require a new file number pursuant to § 73.3572(b)) for which local notice pursuant to § 73.3580 is required, provided such petitions are filed within 30 days of the FCC Public Notice proposing the application for grant (applicants may file oppositions within 15 days after the Petition to Deny is filed); but where the FCC selects a tentative permittee pursuant to §1.1601 *et seq.*, Petitions to Deny shall be accepted only if directed against the tentative selectee and filed after issuance of and within 15 days of FCC Public Notice announcing the tentative selectee. The applicant may file an opposition within 15 days after the Petition to Deny is filed. In cases in which the minimum diversity preference provided for in § 1.1623(f)(1) has been applied, an "objection to diversity claim," and opposition thereto, may be filed against any applicant receiving a diversity preference, within the same time period provided herein for Petitions and Oppositions. In all pleadings, allegations of fact or denials thereof shall be supported by appropriate certification. However, the FCC may announce, by the Public Notice announcing the acceptance of the last-filed mutually exclusive application, that a notice of Petition to Deny will be required to be filed no later than 30 days after issuance of the Public Notice.

* * * * *

7. 47 CFR 73.3591 is amended by revising paragraph (b) to read as follows:

§ 73.3591 Grants without hearing.

* * * * *

(b) In making its determinations pursuant to the provisions of paragraph (a) of this section, the FCC will not consider any other application, or any application if amended so as to require a new file number, as being mutually exclusive or in conflict with the application under consideration unless such other application was substantially complete, or, in the case of low power TV and TV translator stations, complete and sufficient, and tendered for filing by:

(1) the close of business on the day preceding the day designated by Public Notice as the day the listed application is to be available and ready for processing;

(2) the date prescribed in § 73.3516(e) in the case of applications which are mutually exclusive with applications for renewal of license of broadcast stations; or

(3) the close of business on the day designated by the FCC pursuant to § 73.3564(d) as the date(s) for filing low power TV or TV translator applications.

* * * * *

8. 47 CFR 74.701 is amended by revising paragraph (h) to read as follows:

§ 74.701 Definitions.

* * * * *

(h) Local origination. Program origination if the parameters of the program source signal, as it reaches the transmitter site, are under the control of the low power TV station licensee. Transmission of TV program signals generated at the transmitter site constitutes local origination. Local origination also includes transmission of programs reaching the transmitter site via TV STL stations, but

does not include transmission of signals obtained from either terrestrial or satellite microwave feeds or low power TV stations.

9. 47 CFR 74.732 is amended by revising paragraph (d) to read as follows:

§ 74.732 Eligibility and licensing requirements.

* * * * *

(d) The FCC will not act on applications for new low power TV or TV translator stations or for changes in facilities of existing stations when such changes will result in a major change until the applicable time for filing a petition to deny has passed pursuant to § 73.3584(c).

* * * * *

10. 47 CFR 74.735 is amended by removing paragraph (c)(4) and redesignating paragraphs (c)(5) and (c)(6) as (c)(4) and (c)(5).

11. 47 CFR 74.763 is amended by adding paragraph (b) to read as follows:

§ 74.763 Time of operation.

* * * * *

(b) In the event that causes beyond the control of the low power TV or TV translator station licensee make it impossible to continue operating, the station may discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 days period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

* * * * *

12. 47 CFR 74.765 is amended by revising paragraph (b) to read as follows:

§ 74.765 Posting of station and operator licenses

* * * * *

(b) The licenses or permits of operators employed at low power TV stations locally originating programs (as defined by § 74.701(h)) shall be posted in accordance with the provisions of § 73.1230(b).

* * * * *

13. 47 CFR 74.780 is revised to read as follows:

§ 74.780 Broadcast regulations applicable to TV translator and low power TV stations.

The following rules are applicable to TV translator stations and low power TV stations:

Section 73.653 — Operation of TV aural and visual transmitters.

Section 73.658 — Affiliation agreements and network program practices; territorial exclusivity in non-network program arrangements.

Part 73, Subpart G — Emergency Broadcast System (for low power TV stations locally originating programming as defined by § 74.701(h)).

Section 73.1201 — Station identificaton (for low power TV stations locally originating programming as defined by § 74.701(h)).

Section 73.1205 — Fraudulent billing practices.

Section 73.1206 — Broadcast of telephone conversations.

Section 73.1207 — Rebroadcasts.

Section 73.1208 — Broadcast of taped, filmed or recorded material.

Section 73.1211 — Broadcast of lottery information.

Section 73.1212 — Sponsorship identifications; list retention; related requirements.

Section 73.1216 — Licensee conducted contests.

Section 73.1510 — Experimental authorizations.

Section 73.1515 — Special field test authorizations.

Section 73.1615 — Operation during modifications of facilities.

Section 73.1635 — Special temporary authorizations (STA).

Section 73.1650 — International broadcasting agreements.

Section 73.1680 — Emergency antennas.

Section 73.1940 — Broadcasts by candidates for public office.

Section 73.2080 — Equal employment opportunities (for low power TV stations only).

Section 73.3500 — Application and report forms.

Section 73.3511 — Applications required.

Section 73.3512 — Where to file; number of copies.

Section 73.3513 — Signing of applications.

Section 73.3514 — Content of applications.

Section 73.3516 — Specification of facilities.

Section 73.3517 — Contingent applications.

Section 73.3518 — Inconsistent or conflicting applications.

Section 73.3519 — Repetitious applications.

Section 73.3521 — Mutually exclusive applications for low power TV and TV translator stations.

Section 73.3522 — Amendment of applications.

Section 73.3525(a), (b), (d), (f), (g), (h) and (i) — Agreements for removing application conflicts.

Section 73.3533 — Application for construction permit or modification of construction permit.

Section 73.3534 — Application for extention of construction permit or for construction permit to replace expired construction permit.

Section 73.3536 — Application for license to cover construction permit.

Section 73.3538(a)(1)(3)(4), (b) (2) — Application to make changes in existing station.

Section 73.3539 — Application for renewal of license.

Section 73.3540 — Application for voluntary assignment or transfer of control.

Section 73.3541 — Application for involuntary assignment or transfer of control.

Section 73.3542 — Application for temporary authorization.

Section 73.3544 — Application to obtain a modified station license.

Section 73.3545 — Application for permit to deliver programs to foreign stations.

Section 73.3561 — Staff consideration of applications requiring Commission action.

Section 73.3562 — Staff consideration of applications not requiring action by the Commission.

Section 73.3564 — Acceptance of applications.

Section 73.3566 — Defective applications.

Section 73.3568 — Dismissal of applications.

Section 73.3572 — Processing of TV broadcast, low power TV, and TV translator station applications.

Section 73.3580 — Local public notice of filing of broadcast applications.

Section 73.3584 — Petition to deny.

Section 73.3587 — Informal objections.

Section 73.3591 — Grants without hearing.

Section 73.3593 — Designation for hearing.

Section 73.3594 — Local public notice of designation for hearing.

Section 73.3597 — Procedures on transfer and assignment applications.

Section 73.3598 — Period of construction.

Section 73.3599 — Forfeiture of construction permit.

Section 73.3601 — Simultaneous modification and renewal of license.

Section 73.3603 — Special waiver procedure applicable to applications.

Section 73.3612 — Annual employment report (for low power TV stations only).

Section 73.3613 — Filing of contracts (network affiliation contracts for low power TV stations only).

14. 47 CFR 74.783 is amended by revising paragraphs (a) and (c) to read as follows:

§ 74.783 Station identification.

(a) Each TV translator station and low power TV station not originating local

programming is defined by § 74.701(h), over 0.001 kw peak visual power (0.002 kw when using circularly polarized antennas) must transmit its station identification as follows:

* * * * *

(c) A low power TV station shall comply with the station identification procedures given in § 73.1201 when locally originating programming, as defined by § 74.701(h). The identification procedures given in paragraphs (a) and (b) to be used at all other times.

* * * * *

October 17, 1984

STATEMENT OF COMMISSIONER HENRY M. RIVERA CONCURRING IN PART

RE: Low Power Television and Television Translator Service

I reluctantly concur in that part of this decision that does not designate translators as a priority or separate class of service for processing purposes.[1]

Since the Commission authorized the low power television service, it has had several opportunities to provide translator service to areas of the country that lack television reception.[2] The Commission has taken the position that providing a priority for translators would, among other things, greatly diminish origination flexibility for translators.[3] Such a position reflects a lack of sensitivity to the fact that to the rural citizen with no television service, any service now is much more useful than service later that might be superior because of origination capacity.

In any event, the Commission has now procrastinated to such an extent that anything we could do now will not make up for the years of service to rural areas that was lost. To the contrary, the *Report and Order* states that attempting now to give translators priority will only exacerbate the delay.[4] Given that statement, the commitment I have received from the Mass Media Bureau that it will process single applications which come from rural areas first and the Bureau's assurances that rural translator

[1] *See Report and Order,* paras. 13–26.

[2] For example, tiered processing could have included evaluation of Tier I (rural) applications without regard to Tier II and Tier III (urban) applications; additionally, at several points, various commenters pled with the Commission to maintain a processing distinction between translator and LPTV applicants.

[3] *See e.g., Report and Order,* paras 5, 14 and 17–26.

[4] *Report and Order,* para. 23.

applicants will be less likely to be subject to mutually exclusive applications under the new processing system, I feel the best course is to concur. If I were writing on a clean slate, I certainly would have done things differently.

Comparative Coverage Issue
Ownership and Management, Integration of

Review Board affirmed ALJ's Initial Decision. Losing applicant was not entitled to integration credit for principal who intends to work as bookkeeper and office and traffic manager. Even if accorded credit, however, losing applicant could not prevail because the preferences accorded winning applicant for comparative coverage and auxiliary power were sufficient to outweigh slight integration credit that loser would receive. —*Makai Broadcasting, Inc.*
MM Docket No. 83-1113

FCC 85R-78

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Makai Broadcasting, Inc. Kailua-Kona, Hawaii	MM Docket No. 83-1113 File No. BPH-820928AF
Fakas, Fukumitsu and Bump d/b/a Fakas Broadcasting Kailua-Kona, Hawaii	MM Docket No. 83-1114 File No. BPH-821215AD
For Construction Permit for a New FM Station	

Appearances

John P. Bankson, Jr. and *Susan Reid Morris* on behalf of Makai Broadcasting, Inc.; and *Jerome S. Boros* and *Katy McGuinness* on behalf of Fakas Broadcasting.

DECISION

Adopted: September 19, 1985; Released: September 24, 1985

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS AND BLUMENTHAL.

BOARD MEMBER BLUMENTHAL:

1. This proceeding involves the mutually exclusive applications of Makai Broadcasting, Inc. (Makai) and Fakas Broadcasting (Fakas) for authority to construct a new commercial FM broadcast station to operate on Channel 228A at Kailua-Kona, Hawaii. By *Hearing Designation Order* (*HDO*), MM-221, released October 18, 1983, the applications were set for consolidated hearing on the standard comparative issue.[1] The *HDO* also provided for consideration of the coverage proposals of both applications to determine whether either applicant was entitled to a comparative preference. *HDO, supra,* at para. 13. In an *Initial Decision* (*I.D.*), FCC 85D-18, released March 26, 1985, presiding Administrative Law Judge (ALJ) John M. Frysiak granted Fakas' application, finding it to be the clear winner under various elements of the best practicable service objective, *i.e.,* integration of ownership and management, comparative coverage, and auxiliary power. The proceeding is now before the Review Board on exceptions filed by Makai and conditional exceptions filed by Fakas. The Board has reviewed the *I.D.* in light of the exceptions and reply briefs, the oral argument held July 31, 1985, and our examination of the record. We adopt the findings of fact and conclusions of law in the *I.D.*, except as modified herein, and affirm the ALJ's ultimate conclusion that grant of Fakas' applications will best serve the public interest.

2. Only the element of integration of ownership and management requires further elaboration since Makai has not excepted to the findings or conclusions on either comparative coverage — where the ALJ accorded Fakas a slight to moderate preference for its overall service advantage and service to underserved areas — or auxiliary power — where Fakas received a slight preference for proposing auxiliary power sources at its studio and transmitter sites. Instead, Makai confines its exceptions to the ALJ's failure to attribute to it integration credit for the proposal of its 25% shareholder, Sally A. Garrison, to serve full time as the

[1] A third competing application, that of Abell Communications Corporation, was dismissed by *Memorandum Opinion and Order*, FCC 84M-3564, released August 15, 1984, pursuant to a settlement agreement between Fakas and Abell.

station's proposed bookkeeper, office manager, and traffic manager. The ALJ credited the integration proposals of the two remaining Makai principals, Norman E. Garrison (25% shareholder) and Stuart N. Katz (50% shareholder), but concluded that Fakas' quantitative integration advantage (90% versus 75% for Makai) entitled Fakas to a clear integration preference. Makai contends that Ms. Garrison should be fully credited as an integrated principal, and that with this additional 25% accreditation, it is entitled to a moderate integration preference predicated on its quantitative (100% versus 90%) and qualitative advantages, which when combined, it argues, far outweigh the preferences accorded Fakas.

3. We agree with the ALJ that Makai is not entitled to integration credit for the proposed participation of Ms. Garrison. The Board has previously observed "that without management and policy functions an applicant's principals do not merit ownership integration credit." *Apogee, Inc.*, 99 FCC 2d 979, 987 (Rev. Bd. 1985). Thus, the occupational duties typically associated with the positions of bookkeeper, office manager, and traffic manager have not been deemed managerial, and the positions themselves not accorded integration credit. *See Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 493-494 (Rev. Bd. 1984); *Apogee, Inc., supra.* Here, as in the cases noted above, Makai has not demonstrated how Ms. Garrison's position will involve policy making duties — emphasized in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965) — as opposed to typical employee-type activities, and therefore there is no record basis on which to award Makai integration credit for Ms. Garrison.[2] Perhaps anticipating our result here, however, Makai argues in the alternative that Ms. Garrison's 25% interest should be attributed to her husband, Norman Garrison, pursuant to the spousal attribution policy enunciated in *Absolutely Great Radio, Inc.*, 95 FCC 2d 1023, 1027 (1983). ("[S]pousal attribution .... permitted in integration cases where the evidence established that the fully integrated spouse exercises control over the interest held by the inactive spouse.")[3]

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[2] Additionally, there is some question whether Ms. Garrison would be entitled to full-time credit even were her duties considered managerial since her testimony indicates that she will only be available part time (20 hours per week) at the station until she and her husband sell their real estate business, which he estimates will not take place until approximately three or four months after the station becomes operational. Makai Exh. 4; Tr. 115.

[3] Implementation of the spousal attribution policy concerning integration is currently under advisement by the Commission as a result of the Court's

Makai asserts that Ms. Garrison will "defer various matters" at the station to her husband. Makai Reply Br. at 5. This standby position is also unavailing. The Commission cautioned in *Absolutely Great Radio, Inc., supra,* that "integration credit is not warranted unless the evidence establishes that the less active spouse will defer to the integrated spouse *in all matters* concerning the operation of the station *and that the integrated spouse controls the entire interest held jointly with his/her spouse.*" 95 FCC 2d at 1027–1028 n. 14 (emphasis added). Here, however, Mr. Garrison does not jointly own his wife's shares of stock nor does Ms. Garrison propose to defer to him on all matters; and the policy therefore would appear inapplicable.

4. Furthermore, Makai would not prevail in this proceeding even were we to grant its exception and accord it 100% quantitative full-time integration credit augmented by various qualitative enhancements.[4] A quantitative integration advantage of 10% (100% versus 90%), even if qualitatively superior, merits at most a slight integration preference — contrary to the moderate preference suggested by Makai. *See San Joaquin Television Improvement Corp.,* 96 FCC 2d 594, 600 (Rev. Bd. 1983) (100% versus 87% warrants slight integration preference); *Minority Broadcasters of East St. Louis, Inc.,* 99 FCC 2d 264, 268 (Rev. Bd. 1984) (100% versus 83.485% — slight integration preference given); *Apogee, Inc., supra,* 99 FCC 2d at 988 (100% versus 75% — slight integration preference awarded). And, in the instant case, as noted in para. 2, *supra,* Fakas was accorded a slight to moderate comparative coverage preference and a slight auxiliary power preference. While ownership integration is of "substantial importance" (*Policy Statement, supra,* 1 FCC 2d at 395) and would generally prevail over an equal or lesser comparative coverage preference (*cf. Cannon's Point Broadcasting Co.,* 93 FCC 2d 643, 656 (Rev. Bd. 1983)[5] that is not the case here where the coverage preference is stronger. *Cf. Christian Broadcasting of*

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remand in *Ventura Broadcasting Co. v. FCC,* Case Nos. 83-2167 and 84-1227 (D.C. Cir. decided June 18, 1985). *See Absolutely Great Radio, Inc.,* FCC 85I-114, released August 22, 1985.

[4] Makai faults the ALJ for not weighing the qualitative integration enhancement factors in arriving at his comparative evaluation. We note, however, that the ALJ made findings on the enhancement factors but concluded, consistent with Commission precedent, *see Leflore-Dixie, Inc.,* 57 RR 2d 1155, 1159 (Rev. Bd. 1985), that the qualitative differences between the two applicants were insufficient to overcome a clear quantitative difference. Makai's exception will be denied.

[5] Reversed on other grounds *sub nom. James U. Steele v. FCC,* Case No. 84-1176 (D.C. Cir. decided August 23, 1985).

Midlands, Inc., 99 FCC 2d 578, 584 (Rev. Bd. 1984). Under prior precedent, it is clear that Fakas would prevail on the basis of its coverage superiority buttressed by its slight auxiliary power preference. *See Houston Family Television. Ltd.*, FCC 85R-56, released July 10, 1985 n. 10 (very slight integration preference outweighed by slight comparative coverage); *Christian Broadcasting of Midlands, Inc., supra*, 99 FCC 2d at; 583-584 (moderate to substantial comparative coverage preference outweighs a slight preferences for diversification of control and integration of ownership and management). In any event, for the reasons stated in para. 3, above, we have not granted Ms. Garrison integration credit, and we conclude therefore that Fakas is entitled to preferences on comparative coverage, integration, and auxiliary power, making it the clear comparative winner.[6]

5. ACCORDINGLY, IT IS ORDERED, That the application of Fakas Broadcasting (File No. BPH-821215AD) for authority to construct a new FM broadcast station at Kailua-Kona, Hawaii IS GRANTED, and the application of Makai Broadcasting, Inc. (File No. BPH-820928AF) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL
Member, Review Board

[6] Conditional exceptions by Fakas that the ALJ erred in only according it a slight to moderate coverage preference and in crediting Makai with integration credit for principal Stuart Katz are denied as being of no decisional significance in light of our holding.

FCC 85D-18

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Makai Broadcasting, Inc. Kailua-Kona, Hawaii	MM Docket No. 83-1113 File No. BPH-820928AF
Fakas, Fukumitsu and Bump d/b/a Fakas Broadcasting Kailua-Kona, Hawaii	MM Docket No. 83-1114 File No. BPH-821215AD
For Construction Permit for a New FM Station	

Appearances

John P. Bankson, Jr. on behalf of Makai Broadcasting, Inc.; *Irving Gastfreund, Jerome S. Boros* and *Heidi P. Sanchez* on behalf of Fakas, Fukumitsu and Bump d/b/a Fakas Broadcasting; and *Paulette Laden* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: March 21, 1985; Released: March 26, 1985

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Makai Broadcasting, Inc. (Makai) and Fakas Broadcasting (Fakas) for an FM station on Channel 228A at Kailua-Kona, Hawaii.[1] The Hearing Designation Order (MM-221, released

[1] Abell Communications Corporation (Abell) was dismissed by Order FCC 84M-3564, released August 15, 1984 pursuant to Joint Request for Approval of

October 18, 1983) specified the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if any.

This Order also provided for consideration of comparative coverage under Issue 1, because of differences in the areas and populations to receive 1 mV/m or better service from the proposals (HDO para. 13).

2. A prehearing conference was held on December 23, 1983. Hearing was held on April 10, 1984; April 11, 1984 and June 7, 1984. The record was closed on June 7, 1984. The parties filed proposed findings on August 14, 1984 and replies on September 4, 1984.

Findings of Fact

A. Comparative Coverage

3. The following is the population and area within each applicant's predicted 1 mV/m contour:

	Area (sq. mi.)	*Population*
Makai	132	8,600
Fakas	192	11,300

4. The entire area within Makai's proposed 1 mV/m contour lies within Fakas' proposed 1 mV/m contour. Accordingly, the only uncommon service area would be served by Fakas. The following table illustrates the areas and populations within that uncommon service area which receive 5 or fewer other services:

Daytime	*Area (sq. mi.)*	*Population*
3 other services	15	1450
4 other services	30	900
5 other services	15	350

Agreement filed by Fakas and Abell (7-13-84) whereby Abell agreed to the dismissal of its application.

Nighttime		
2 other services	0.5	30
3 other services	49	2400
4 other services	8	250
5 other services	3	50

B. The Applicants

5. *Makai Broadcasting, Inc.* Makai has the following officers, directors and stockholders (Makai Ex. 1; Tr. 80); Norman E. Garrison — president, director and 25% stockholder; Sally A. Garrison — secretary, treasurer, director and 25% stockholder; and Stuart N. Katz — vice president, director and 50% stockholder. Norman Garrison and Sally Garrison are husband and wife. Stuart Katz is the brother of Sally Garrison (Makai Ex. 2; Tr. 53, 80). All three of Makai's stockholders will be employed at the proposed station (Makai Exs. 2, 3, 4).

6. *Norman E. Garrison* will be the full-time general manager. He is and has been a resident of Kailua-Kona for more than seven years. From January, 1974 through September, 1979, Mr. Garrison was employed most of the time by radio stations in Hawaii as general manager, account executive, salesman and announcer. Mr. Garrison also has worked as a free-lance sportscaster, interviewer, interview host and moderator on the public access channel of Comtec's Cable Television System in Hilo (Makai Ex. 2).

7. Mr. Garrison has been a member of the Kona Coast Chamber of Commerce since 1977 and served as president in 1979. Prior to 1979 he was on the Board of Governors of the Kona Dollar Division of the Kona Coast Chamber. In 1980, Mr. Garrison was a candidate from the Kona District for the Hawaii House of Representatives. He has been active in the Hawaii Island Democratic Party and served as Chairman and Chief Organizer of a fund raising drive for one of the candidates in Hawaii's gubernatorial election in 1981. In 1982, Mr. Garrison served as vice president of the Rotary Society (Makai Exs. 2, 4; Tr. 117, 118).

8. *Stuart N. Katz* will be the full-time sales manager of the proposed station. He will be responsible for retail sales and local advertising agency accounts (Makai Ex. 3, Tr. 30). Mr. Katz was sales manager of Shaull's Carbide Saw and Tool Service from

January, 1978 to December, 1983 (Makai Ex. 3, pp. 1-2; Tr. 43-44). From March, 1967 to January, 1978, Mr. Katz was a supervising appraiser for Travelers Insurance (*Ibid.*, Tr. 42-44, 47). From 1962 to 1967, Mr. Katz was engaged in the auto repair business in California (Tr. 47).

9. *Sally A. Garrison* is proposed to be employed as a bookeeper, office and traffic manager (Makai Ex. 4, Tr. 53). She will do sales work for Makai's proposed station also (Tr. 74). She will not supervise any employees (Tr. 60).

10. Mrs. Garrison is currently a real estate salesperson in business with her husband (Tr. 61). She testified that upon grant, she will spend 20 hours per week in her station duties (Makai Ex. 4, Tr. 53), but she will work full-time at the station when and after the real estate agency is sold (*Ibid.*) From February, 1977 to September, 1979, Mrs. Garrison worked on an as needed basis for Radio Station KKON in Kealakekua, preparing logs and payroll, writing and producing commercial announcements and answering telephones (Makai Ex. 4, p. 2, Tr. 83-83). She assisted her husband in camera operation in cable television access programming in Hilo, Hawaii (Tr. 100-101). Mrs. Garrison has approximately 25 years of bookeeping experience and has been office manager for construction companies, real estate businesses and a medical doctor. Mrs. Garrison has also been employed as the Kona Dollar Lady by the Chamber of Commerce selling coins and promoting the area from November, 1977 to July, 1979 and, also, briefly in 1979, she operated a roller skate rental business (Makai Ex. 4, pp. 1-2).

11. *Fakas, Fukumitsu and Bump d/b/a Fakas Broadcasting.* Fakas is a partnership registered for business in the State of Hawaii; James A. Fakas is a 90% voting partner and Ralph Fukumitsu is a 10% voting partner. Fukumitsu is of Japanese descent (Fakas Ex. 1; Tr. 132, 139-140).

12. *Mr. James A. Fakas* is a Caucasian male. He resides in Redlands, California where he has been employed in broadcasting since April, 1970 for Station KCAL-FM. Mr. Fakas became station manager in 1978 and general manager in 1980 (Fakas Ex. 2; Tr. 133-141). Mr. Fakas has been vice president and director of the licensee of the Redlands station since January 22, 1981. He is one of five directors and five officers. He has no ownership interest in the licensee and he has informed the other officials of the licensee that he will resign from his official positions upon grant of the Fakas application and relocate to Kailua-Kona,

Hawaii. He has been informed that his resignation will be accepted (Fakas Exs. 2, 3, 4; Tr. 133, 135, 137, 141-143).

13. Mr. Fakas proposes to relocate to Kailua-Kona immediately following a grant of his application and is proposed as the full-time general manager (Fakas Ex. 3; Tr. 135). Mr. Fakas also proposes to install two auxiliary generators capable of providing energy to the proposed station in the event of a malfunction in the usual source of electric power (Fakas Ex. 5; Tr. 148-149).

Conclusions of Law

14. The comparative process weighs qualified applicants on all relevant factors (*Johnston Broadcasting Company* v. *FCC*, 175 F.2d 351 84 U.S. App. D.C. 40, 4 RR 21, 38 (1946), in accordance with Commission policy formulations. (*Policy Statement on Comparitive Broadcasting Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965) (Policy Statement) and *Addendum to Policy Statement on Comparative Broadcast Hearings*, 2 FCC 2d 667, 6 RR 2d 861 (1966) (Addendum). Only three factors embodied in those statements have instant applicability, namely, comparative coverage, best practicable service and auxiliary power.

Comparative Coverage

15. Fakas possesses an advantage in both the total area and population which it intends to serve and in service to underserved areas. Indeed, Makai's proposed service area lies entirely within Fakas'. Fakas will provide a third, fourth, fifth and sixth service which Makai would not. Accordingly, Fakas is entitled to a slight to moderate preference.

Best Practicable Service

16. The Commission presumes that an applicant whose principals will be involved on a full-time basis in the day-to-day management and policy making of a station offers the optimum prospect of providing superior service. The degree of involvement constitutes "quantitative integration". Such integration is enhanced by background characteristics of involved principals, *i.e.*, by "qualitative integration". Assets of qualitative integration are local residence, local civic participation, broadcast experience and, in appropriate contexts, minority and/or female participation. Numerous cases have stated that a clear quantitative integration advantage cannot be overcome by qualitative enhancement. *See,*

e.g., Vacationland Broadcasting Company, Inc., 55 RR 2d 1929 (Rev. Bd. 1984); *Absolutely Great Radio, Inc.*, 55 RR 2d 15, (1983); *Van Buren Community Services Broadcasters, Inc.*, 87 FCC 2d 1018, 50 RR 2d 115 (Rev. Bd. 1981). In *New Continental Broadcasting Co.*, 88 FCC 2d 830, 50 RR 2d 1117 (Rev. Bd. 1981), the Review Board held that a 12.5% quantitative difference constituted a clear preference.

17. Quantitatively, Fakas is entitled to credit for 90% full-time integration. Makai claims 75% full-time integration credit based upon the proposals of Messrs. Garrison and Katz to involve themselves in station operation. Makai also claims 25% part-time credit based upon the proposal of Mrs. Garrison to spend 20 hours a week in station operation pending sale of the Garrison's real estate agency. Makai further claims that upon sale of the real estate agency, Mrs. Garrison will become a full-time station employee. Commission standards, however, foreclose Makai from obtaining the claimed quantitative credit for Mrs. Garrison's proposed involvement.

18. Mrs. Garrison will not be employed in a managerial or policy making role. She will not supervise any employees, but will function in a clerical capacity as bookkeeper and office and traffic manager. She will also be involved in making some sales. Precedent precludes Makai from receiving integration credit under these circumstances. A case in point is *Vacationland Broadcasting Company, Inc.*, (*supra*). There, the Review Board noted that, although the record showed that the proposed role was one of supervising and managing the traffic and bookeeping departments, as well as engagement in the direct sales, no showing was made how this role involved policy making or how the principal would fill "an important role in management". Mrs. Garrison's proposal is similarly deficient.

19. Fakas, therefore, has a clear quantitative integration advantage (90% versus 75%) over Makai. For this reason, qualitative enhancement factors need not be addressed. Fakas deserves a clear preference for its superior integration proposal.

Auxiliary Generator

20. Fakas is entitled to a slight preference for its proposal to install auxiliary generators at the studio and transmitter sites.

21. Fakas has an edge under the comparative coverage criterion and also is entitled to a clear preference under the best

practicable service criteria. In light of this analysis, Fakas is the clear winner and its application will be granted.

22. Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the Rules, the application of Fakas, Fukumitsu and Bump d/b/a Fakas Broadcasting (File No. BPH-821215AD) for a construction permit to build and operate a new FM broadcast station on Channel 228A at Kailua-Kona, Hawaii, IS GRANTED and the application of Makai Broadcasting, Inc. (File No. BPH-820928AF) IS DENIED.[2]

FEDERAL COMMUNICATIONS COMMISSION

JOHN M. FRYSIAK, *Administrative Law Judge*

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Character Qualifications
Diversification of Control of Mass Media
Financial Qualifications, Issue Requested, Denied
FM Station, Authorization
Ownership and Management, Integration of

Review Board affirmed I.D. grant to comparative applicant with moderate integration (100% v. 54%) and very slight comparative coverage (small 2nd service edge) preferences. Post-oral argument supplement removed any doubt about financial qualifications. Affirmed ALJ's rulings denying petitions to enlarge issues to add financial, reporting, misrepresentation and character issues.
—*Marrow Enterprises, Inc.*
MM Docket No. 83-941

FCC 85R-70

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Marrow Enterprises, Incorporated Olympia, Washington	MM Docket No. 83-941 File No. BPH-810924AC
Three Cities FM, Inc. Olympia, Washington	MM Docket No. 83-942 File No. BPH-810925AG
Washington Oregon Broadcasting, Inc. Olympia, Washington	MM Docket No. 83-943 File No. BPH-810925AM
For a Construction Permit for a New FM Station	

Appearances

Dennis P. Corbett and *Steven A. Lerman*, on behalf of Marrow Enterprises, Incorporated; and *Sally Jane Novak* and *David C. Jatlow*, on behalf of Three Cities FM, Inc.

DECISION

Adopted: August 19, 1985; Released: August 26, 1985

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL

BOARD CHAIRMAN MARINO:

1. Two conflicting or mutually exclusive applications of Marrow Enterprises and Three Cities, FM, Inc. to construct a new FM broadcast station in Olympia, Washington remain in this comparative case. A third application, that of Washington Oregon Broadcasting, was denied in the Initial Decision of Administrative Law Judge Conlin, FCC 85D-5, released January 23, 1985; it did not file exceptions and will therefore be dismissed. See 47 CFR 1.276(f). After reviewing the ALJ's Initial Decision in the light of the exceptions, reply brief, submissions following oral argument and its own independent examination of the record, the Review Board hereby adopts the ALJ's findings and conclusions, except as modified below, and affirms his conclusion that a grant of Three Cities' application is required by well-established Commission comparative policy.

2. *Background*: By Hearing Designation Order, 48 Fed. Reg. 43402, published September 23, 1983, a consolidated hearing was ordered on a basic financial qualifications issue against Three Cities, as well as on the standard comparative issue which included consideration of comparative coverage of areas and populations. In an Order, FCC 83M-4288, released November 21, 1983, the ALJ granted Three Cities' unopposed motion for summary decision and resolved the financial issue favorably to that applicant. Then, by Initial Decision, *supra*, the ALJ found Three Cities to be comparatively superior because of its preferences for ownership participation in management and comparative coverage; he therefore granted its application. Exceptions were filed by Marrow to which Three Cities' replied. The oral argument held May 24, 1985, focused largely on Marrow's claim that the ALJ erred in denying a new financial qualifications issue against Three Cities. When it became clear at oral argument that both

applicants had estimated their financial costs in 1981 at about the same level, and that thereafter neither applicant had updated those estimates (TR. 241), they were afforded "one further opportunity to clarify their financial showings." Order, FCC 85R-50, released June 18, 1985, at para. 2. Both applicants were called upon to submit updated and current cost estimates and to show the sources of funds available to meet their costs. *Id.* In addition, Three Cities was specifically ordered to account for its obligation under a previously approved settlement agreement to pay $200,000 to two dismissing applicants and to reconcile its cost estimates with such estimates previously supplied to prospective investors. *Id.* On July 10, 1985, the applicants submitted their supplementary material pursuant to our Order, *supra*, and by July 22 each had commented on the other's submission.

3. *New Financial Issue.* Marrow's main exception is to the ALJ's Order, FCC 84M-4099, released September 25, 1984, which denied its July 2, 1984 petition to enlarge issues to add a new financial qualifications issue and related reporting and misrepresentation issues against Three Cities. In its 1981 application, Three Cities had estimated its costs of construction and initial three-month operation to be $410,728 and its available funds to be $414,534, leaving it with a $3,806 cushion. Noting that Three Cities' estimated cushion was small, Marrow claimed that Three Cities' estimated costs were outdated, that in six private placement memoranda (PPM) distributed to its investors Three Cities disclosed significantly greater costs, and that Three Cities had failed to demonstrate that its obligation to pay $200,000 pursuant to a settlement agreement had not eroded its financial qualifications.

4. We deny Marrow's exception. Three Cities' July 10, 1985 supplement confirms the correctness of the ALJ's earlier ruling and establishes firmly its financial qualifications, removing any doubt that Three Cities was ever in a "shoestring"-type situation. Three Cities has now suppied an updated FCC Form 301 financial showing including: a breakdown of all cost estimates reflecting monies already paid and to be paid, a comparison of its 1981 showing and its current showing, and a demonstration of the ability of its investors to meet their commitments. Specifically, Three Cities has now increased its cost estimates to $735,000; however, the bulk of the increase ($200,000) is due to the settlement agreement and $53,000 represents increased legal fees. To meet these costs, Three Cities has now demonstrated $816,000 in total funds available, a $402,000 increase which creates an

$81,000 cushion of funds in excess of costs, which cushion considerably exceeds its earlier estimates. Basically, Three Cities' shareholders have paid in an additional $171,000 of capital and four of them have made new loan commitments totalling $235,000 to the applicant. In addition, balance sheets from these four lenders establish that they can easily meet their increased obligations to Three Cities because their net worths and their net current and liquid assets, which in several cases are more than $1 million, exceed substantially their loan commitments. *See* Three Cities Submission filed July 10, 1985, Attachment 1(a), at 7, and Attachment 1(b), at 5 *et seq*. *Cf. Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 705-708, 51 RR 2d 389, 391-92 (Rev. Bd. 1982).

5. Marrow's comments on Three Cities' supplement do not challenge the availability of these commitments. Also, with regard to its $200,000 settlement obligation, Three Cities states that $100,000 has already been paid from the $125,000 proceeds of a stock sale that it reported earlier in the proceeding and that the funds used to pay this $100,000 were separate from and did not affect the available fund sources relied on in its original application. Marrow does not question these statements and its comment that the price per share of stock sold was inexplicably 8½ times the price of previously issued stock raises no cause for our concern. Insofar as Marrow implies some wrongdoing, the record evidence is devoid of any complaint by shareholders or any action by the appropriate securities agencies, Federal or local; we are not informed of any possible violation of law; and Marrow's contentions are purely speculative.

6. With regard to the cost estimates given prospective investors, although Marrow correctly points out that Three Cities did not submit a line-by-line reconciliation of its FCC and private placement memorandum (PPM) cost estimates, it has now shown that the PPM costs (disclosed to investors) contain amounts paid before the applicant was incorporated and the application filed, amounts needed to capitalize fully the broadcasting operation through the first two years of operation, and amounts that could be used for a gold-plated or "superior" broadcasting facility based on full subscriptions for the stock offerings. Submission, *supra*, at 6-7, Attachment 3, at 3-4 and *passim*; see Reply at 3-4. The PPM also stated that "a fully operational broadcasting facility could be procured for substantially less." *Id.* Thus, while the PPM offerings were intended to raise maximum capital based on the explicit assumption that all securities offered by each PPM would be sold, the cost estimates supplied the Commission in

Three Cities' application were based on funds actually available to the applicant. Moreover, the $5,000 discrepancy in yearly salary estimates between the FCC and PPM figures, to which Marrow points, is insignificant because of Three Cities' now substantially larger financial cushion and because salaries were conditional in that they could be accrued rather than paid and, thus far, they have been neither paid nor accrued. In sum, based on the updated and detailed information now furnished by Three Cities, we agree with the ALJ that Marrow's allegations based on the PPM estimates and $200,000 settlement obligation are conjectural and fail to raise any significant and material questions of fact concerning Marrow's financial qualifications. *See* FCC 84M-4099, *supra.*

7. *Misrepresentation and Reporting Issues.* With respect to Marrow's request for issues going to misrepresentation or lack of candor, in light of the preceding analysis and Three Cities' strong showing of financial qualifications, we can find no basis to infer that Three Cities had any motive or intent to camouflage its costs, as alleged by Marrow. Although in light of the significance and size of the $200,000 settlement cost in this proceeding, Three Cities should probably have shown in its settlement pleadings that the agreement did not impair its financial qualifications, *see Sandern of Iowa, Inc.*, 26 FCC 2d 136, 138, 20 RR 2d 495, 498 (Rev. Bd. 1970), it is now clear that Three Cities' financial ability was never seriously in doubt. As to its diligence regarding its reporting obligations, Three Cities' additional $200,000 obligation was fully disclosed in the agreement and it did report, however cryptically, that it raised additional sums through the sale of stock.[1] Thus, we can find no basis to add reporting or misrepresentation issues against Three Cities. *Cf. Merrimack Valley Broadcasting, Inc.*, 55 RR 2d 23 (1983), *modified*, 99 FCC 2d 680, 683 n.9, 57 RR 2d 713, 716 n.9 (1984). Even if we did so, at most, no more than a slight reporting demerit could conceivably be warranted, and such would be decisionally insignificant here. See para. 12, below.

8. *Character Issue.* Marrow also excepts to the ALJ's ruling denying its October 24, 1983 petition to enlarge issues by which it sought the addition of an issue to determine whether Three Cities'

[1] In a petition for leave to amend filed June 15, 1984, Three Cities reported the sale of an additional 1475 shares of Class B non-voting stock but did not state the amount of capital raised by the sale or the purpose for which the new capital would be used. The petition was unopposed and was granted by the ALJ. Order, FCC 84M-3041, released July 11, 1984.

principals David J. Rauh and Toni C. Holm misappropriated or misused government funds allocated to non-commercial Station KAOS(FM), Olympia, Washington. Memorandum Opinion and Order, FCC 84M-191, released January 16, 1984. We deny this exception in the main for the reasons given by the ALJ. This matter involved allegations that Rauh and Holm had made personal long-distance telephone calls on the station's WATS line and had used station facilities to produce and distribute OP Magazine. The president of The Evergreen State College, the station's licensee, had the matter investigated and determined ultimately that Rauh and Holm had not engaged in any wrongdoing. Since the university appears to have been the proper forum to address the allegations in the first instance, and having done so, found an absence of culpable behavior, we have no reason to consider the allegations any further.

9. *Comparative Issue.* The I.D. awarded no preference under the diversification of mass media control comparative factor after finding that Marrow had absolutely no other media ownership ties and that Three Cities had the following two inconsequential attributable ownership interests: (a) ownership by a 3.5% non-voting stockholder of less than 1% of the stock of Continental Cablevisions, Inc., which operates 68 cable systems in 11 different states, the closest system being some 800 miles from Olympia; and (b) *OP Magazine*, a bi-monthly entertainment industry publication containing reviews of musical records and have a circulation of 30 in Thurston County (where Olympia is located), 2300 in Washington State, and 6500 nationwide. We deny Marrow's exception that it should have received a diversification preference and affirm the ALJ's analysis and conclusion, supported by his citations to case precedent, *Washington's Christian Television Outreach, Inc.*, 99 FCC 2d 395, 420-1, 56 RR 2d 1539, 1560 (Rev. Bd. 1984); *Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506, 517, 52 RR 2d 1210, 1218 (Rev. Bd. 1982). These interests are essentially *de minimis* and do not meaningfully impact upon the Commission's diversification objectives. *See* I. D., para. 34; *see also Pittsfield Community Television Associates*, 94 FCC 2d 1320, 1321-1322, 56 RR 2d 134, 135-136 (Rev. Bd. 1983).

10. Likewise, we affirm the ALJ's award of 100% ownership participation credit to Three Cities, I.D., para. 35. Although Marrow objects to this award because Three Cities' debenture holders retain certain corporate powers, we find that the powers cited are designed merely to protect the debenture holders in

situations involving extraordinary corporate acts but do not effectively surrender to them voting or control rights over day-to-day or overall station management. *See Cleveland Television Corporation*, 91 FCC 2d 1129, 52 RR 2d 581 (Rev. Bd. 1982), *review denied*, FCC 83-235, released May 18, 1983, *aff'd*, 732 F.2d 962 (D.C. Cir. 1984); *cf. Bradley Hand, and Triplett*, 89 FCC 2d 657, 662, 51 RR 2d 383, 387 (Rev. Bd. 1982) (the award of participation credit focuses on the extent of involvement of *voting* shareholders in management). On the record before us, there is no basis for finding that persons other than David J. Rauh and Toni C. Holm, the voting shareholders, will control Three Cities. *Compare Houston Family Television, Ltd.*, FCC 85R-56, released July 10, 1985, paras. 18-22, *with KIST Corp.*, 99 FCC 2d 173, 57 RR 2d 49 (Rev. Bd. 1984). Here the ALJ considered Three Cities' 100% to 54% edge in quantitative credit to be "clear and substantial" and awarded Three Cities a preference which, in accordance with our precedent, we will categorize as "moderate" in magnitude. *See Leflore-Dixie, Inc.*, 57 RR 2d 1155, 1159 (Rev. Bd. 1985).

11. Finally, we deny Marrow's exception to the ALJ's award of a very slight comparative coverage preference to Three Cities, which will provide a second nighttime service to 841 more people than Marrow and provide 410 more persons with third nighttime service as well as serve 8% more people overall. I.D., para. 38. These advantages, particularly the "second service" edge, while lessened by Marrow's significantly larger numerical edge in the provision of less important fourth and fifth services, are not equalled or outweighed by them. Because the numbers of persons receiving additional second and third services from Three Cities' proposal are relatively small, however, no more than a very slight overall preference is warranted. *See Houston Family Television, Ltd., supra*, at n.10; *Northern Sun Corporation*, FCC 85R-23, released March 13, 1985, at paras. 9-10; *Mark L. Wodlinger*, FCC 85R-62, released August 6, 1985, at paras. 20-21. In light of our ultimate conclusion, para. 12, below, we need not reach Three Cities' challenge to Marrow's financial qualifications set forth in its comments on Marrow's July 10, 1985 petition for leave to amend.

12. In sum, Three Cities has a moderate integration preference and a very slight comparative coverage preference; Marrow has no comparative preferences. Accordingly, we affirm the ALJ's finding that a grant of Three Cities' application would best serve the public interest, convenience and necessity.

13. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed July 10, 1985, and supplemented July 17, 1985, by Marrow Enterprises, Incorporated IS GRANTED, and the amendment IS ACCEPTED; and

14. IT IS FURTHER ORDERED, That the application of Three Cities FM, Inc. (File No. BPH-810925AG) for authority to establish a new FM broadcast station at Olympia, Washington IS GRANTED; that the application of Marrow Enterprises, Incorporated (File No. BPH-810924AC) IS DENIED; and that the application of Washington Oregon Broadcasting, Inc. (File No. BPH-810925AM) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Marrow Enterprises, Incorporated Olympia, Washington	MM Docket No. 83-941 File No. BPH-810924AC
Three Cities FM, Inc. Olympia, Washington	MM Docket No. 83-942 File No. BPH-810925AG
Washington Oregon Broadcasting, Inc. Olympia, Washington	MM Docket No. 83-943 File No. BPH-810925AM
For a Construction Permit for a New FM Station	

Appearances

Dennis P. Corbett and *Steven A. Lerman* on behalf of Marrow Enterprises, Incorporated; *David C. Jatlow* and *Sally Jane Novak* on behalf of Three Cities, FM, Inc.; *J. Richard Carr* on behalf of Washington Oregon Broadcasting, Inc.; and *Charles E. Dziedzic* and *Stephen Yelverton* on behalf of Mass Media Bureau, Federal Communications Commission.

INITIAL DECISISON OF ADMINISTRATIVE LAW JUDGE JOHN H. CONLIN

Issued: January 17, 1985; Released: January 23, 1985

Preliminary Statement

1. This case involves mutually exclusive applications for construction permits for a new FM station in Olympia, Washington filed by Marrow Enterprises, Incorporated ("Marrow"), Three

Cities FM, Inc. ("Three Cities") and Washington-Oregon Broadcasting, Inc. ("WOBI"). The proceeding was designated for hearing by an Order of the Chief, Mass Media Bureau, released September 20, 1983. The designation order specified six issues for hearing, but after the dismissal of several applications[1] and the grant of motions for summary decision,[2] only the following issues remained:

> To determine whether there is a possibility that the tower height and location proposed by WOBI would constitute a hazard to air navigation.
>
> To determine which of the proposals would, on a comparative basis, best serve the public interest.[3]
>
> To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. A pre-hearing conference was convened on November 18, 1983. A hearing session was held on June 19, 1984. The record was closed by the President Judge's *Order*, 84M-3321, released July 31, 1984. Proposed findings and conclusions were filed on September 14, 1984 and replies thereto were filed on October 2, 1984.

FINDINGS OF FACT

3. Marrow is a corporation with the following stockholders, officers, and directors:

Robert L. Blume:	36% stockholder/Chairman of the Board of Directors
Larry J. Blume:	39% stockholder/President/Director
Larry D. Marrow:	15% stockholder/Director
G. Melvin Hastings:	5% stockholder/Secretary-Treasurer/Director
Arlyn D. Muzzy:	5% stockholder/Director
John R. Donaldson:	Vice President/Director

[1] At the time of designation, W-2 Incorporated, (W-2) Olympia Broadcasting Co., Inc. (OBC) and Washington Wireless, Inc. (WWI) were also mutually exclusive applicants for the construction permit. W-2's applications was dismissed by an *Order*, FCC 84M-2353, released May 18, 1984; the applications of OBC and WWI were dismissed by an *Order*, FCC 84M-3043, released July 11, 1984.

[2] See FCC 83M-4287 and FCC 83M-4288, released November 21, 1983.

[3] With the dismissal of the WWI application (n. 1 supra) the Section 307(b) issue specified in the designation order became moot. The related areas and populations issues has been subsumed within the standard comparative issue.

4. *Diversification.* Capital Development Company, of which Robert Blume, John Donaldson, and G. Melvin Hastings are principals and Robert Blume is the controlling shareholder, has pending before the Commission on application for a low power television station in Lacey-Olympia, Washington. None of the shareholders, officers, or directors of Marrow has any other mass media interests.

5. *Integration.* Larry Blume will work full-time (a minimum of 40 hours per week) as General Manager. In that capacity, he will supervise all aspects of station operation. His time commitment to the station will take priority over any conflicts.

6. Larry Blume has lived within Thurston County, Washington for more than 25 years. Thurston County is within the predicted city grade contour of Marrow's proposed station. In the event of a grant of Marrow's application, he will move to Olympia. From 1967 to the present, Larry Blume has been a member of the South Sound Center Merchants Association Board. From 1982 to the present, he has been a member of the Advisory Committee of the Distribution Education Club of America. From 1983 to the present, he has been a member of the Thurston Economic Development Council.

7. Larry Marrow will work full-time (a minimum of forty hours per week) as Sales Manager of the station. In that capacity, he will have managment responsibilities for all aspects of the sales department. His time commitment to the station will take priority over any conflicts.

8. Mr. Marrow has for more than three years maintained a residence in the city of Olympia. Half of this time was actually spent in other out-of-state communities (Tr. 66–67). He will reside in Olympia in the event of a grant of Marrow's application. For more than three years, he has been a member of Olympia's Chamber of Commerce. No other Marrow principal proposes to be integrated into the day-to-day operation of the station.

9. *Auxiliary Power.* In the event of a grant of its application, Marrow will install an auxiliary power generator at the station to allow it to continue operating in the event of a power failure.

Three Cities

10. Three Cities is a corporation which has issued both voting and non-voting stock. Fifty percent of the voting stock is owned by David J. Rauh, who is also the President and a Director of Three Cities. The other 50% is owned by Toni C. Holm, who is

also Vice President, Secretary, Treasurer and a Director of Three Cities. Rauh and Holm also own a majority of the non-voting stock, Rauh 52% and Holm 9.7%. The remaining shares are held by 10 parties whose interests range from 10.2% to 0.7% (Three Cities Ex. 1).

11. In conjunction with the purchase of non-voting Class B common stock, a number of non-voting shareholders have agreed to purchase senior or subordinated debentures from Three Cities in the event its application is granted. The following non-voting shareholders have agreed to purchase debentures: Judith and David Falk (as joint tenants); Trudy D. and Joseph L. Rauh (as joint tenants); Louise W. Rauh; Millard Mack; Alexander Howard and The William A. Friedlander Company (Three Cities Ex. 1, pp. 1, 3).

12. *Diversification.* Neither Three Cities, nor any of its officers, directors or voting stockholders has any interest in any medium of mass communications. With the exception of Alexander Howard, who holds less than 1% of the voting stock of Continental Cablevision, Inc. and is one of 12 directors,[4] none of the non-voting shareholders of Three Cities have any interest in any medium of mass communications.

13. David Rauh and Toni Holm are both members of the Board of Directors of the Lost Music Network ("LMN"), which publishes *OP Magazine*, a bimonthly publication that review records released by independent producers. In addition to being highly specialized, its circulation is very small: about 30 copies of Thurston County, 230 copies in the state, and 6,5000 nationwide. Since 1979, it has been understood by the directors of LMN that the magazine would cease publication with the November/December 1984 issue (Three Cities Ex. 2, p. 5, Ex. 3, p. 7).[5]

14. *Integration.* David J. Rauh is President, Director and owner of 50% of the voting stock of Three Cities. Mr. Rauh will work full-time (a minimum of 40 hours per week) as General Manager of the station. He will be responsible for publicity, public relations, station promotions and marketing. Mr. Rauh is employed part-time as retail clerk at a record store in Olympia and also works part-time as National Sales Director of *OP Magazine*. He will

[4] Continental Cablevision, Inc. does not operate or own any cable systems in Washington or Oregon. The cable system closest to Olympia is in Stockton, California, approximately 800 miles from Olympia.

[5] This has in fact happened. See 84M-5301, released December 20, 1984; 84-5310, released December 21, 1984.

terminate his part-time job if Three Cities' application is granted, and his part-time employment at *OP Magazine* ceases with the demise of that publication.

15. Mr. Rauh has resided in Olympia since 1979 and has been a resident of Thurston County since 1975 except for an eight month period in 1976. From June 1982 until June 1984, he was President of the Board of Directors of the Crisis Clinic of Thurston and Mason Counties (Tr. 77) and continues to be associated with the clinic. From 1980 to 1983 he was Director of the Evergreen State College Alumni Association (The college is located in Olympia).

16. From 1977 to 1983 Mr. Rauh worked in various capacities at KAOS-FM, a non-commerical station licensed to Evergreen State College. In 1977 he was the station's business manager, working 20 hours per week. He became General Manger in 1978, a full time position, and remained until March 1979. He received a degree in communications management from the college at that time and continued his association with the station on a part-time basis until 1983.

17. Toni C. Holm is Vice President, Treasurer, Secretary, Director and owner of 50% of the voting stock of Three Cities. She will work full-time (a minimum of 40 hours per week) as the Business and Operations Manager of the station. In that position Ms. Holm will be responsible for supervising the Program Director, the News and Production Staff, the Traffic Manager and Engineer as well as overseeing the station's Equal Employment Opportunity Program. Presently, Ms. Holm is a self-employed Development Consultant. If Three Cities' application is granted, Ms. Holm will cease this activity and discontinue volunteer work she has performed at KAOS-FM.

18. Ms. Holm has been a resident of Olympia since May 1979. From September 1975 through January 1976, and from April 1976 through May 1978, Ms. Holm resided in Thurston County. Since December of 1981, Ms. Holm has been a volunteer at Safeplace, a women's shelter and rape crisis program in Olympia. Since May 1983, Ms. Holm has been a Board Member of Washington Women United, a non-profit statewide organization that monitors legislative issues of concern to women in the State of Washington, lobbies for issues decided upon by the membership and informs members in each local area about specific bills and legislation.

19. Beginning in 1970 Ms. Holms has worked for various periods of time at several non-commerical broadcast stations: 1970–1974, part-time volunteer work at WYSO(FM), Yellow

Springs, Ohio; 1976, full-time Program Director at KAOS-FM; 1977, General Manager of KAOS-FM, also a full-time position. She has done volunteer work at KAOS-FM since 1979 and has also been employed for brief periods by KUNM(FM), Albuquerque (four months), KPLU-FM, Tacoma (two months) and KQED-TV, San Francisco (three months). In these various positions Ms. Holms acquired experience in radio production, air scheduling, local ascertainment techniques, program development and evaluation, supervision of employees, budgeting and fundraising. In March 1978, Ms. Holm received a degree in communications management from Evergreen State College. Additionally, Ms. Holm had taken courses in circuit design and electronic theory at both Evergreen and Antioch College.

20. Both Marrow and WOBI contend that the integration proposed by Rauh and Holm is vitiated by the terms the debenture agreements referred to in para. 11 *supra*, arguing that somehow control of the corporation resides in the debenture subscribers rather than with the holders of the voting stock, Rauh and Holm.

21. The rights given to the debenture holders include the following: 67% of the debenture holders holding outstanding debentures must give consent if Three Cities is to incure indebtedness in excess of $1,091,950; pay dividends before the debentures are paid in full; sell more than 20% of the company's assets outside the ordinary course of business; or take any corporate action (dissolution, merger, liquidation, for example) which would result in the transfer or cessation of all or substantial portion of Three Cities' business. Similarly consent is required to amend the company's articles of incorporation in a way that would work to the detriment of the debenture holders' rights to principal and interest; to extend credit by means of a guarantee or provision of security for the debt of anyone other than the company; or to undertake actions that would have a specified adverse impact on the relationship of current assets to current liabilities or the company's debt-equity ratio (Tr. 93–96).

22. On the other hand the agreements do not vest in the debenture holders any control over the corporation or the day-to-day operations of the proposed station. According to Mr. Rauh, "the terms of the debenture purchase and sale agreement were suggested by . . . corporate counsel as some basic protections for our debenture holders [and] Class B non-voting shareholders because they have no voting rights and no control of operation" (Tr. 98). The terms of the agreements were established by Rauh,

Holm and Three Cities' corporate counsel without input from the debenture holders and were accepted by the latter (Tr. 89).

23. *Auxiliary Power.* Three Cities will install an auxiliary power generator.

WOBI

24. WOBI is a corporation with the following officers and directors:

Carol Ann Brown:	President/Director
Donald A. Brown:	Vice President
William B. Smullin:	Chairman of the Board/Director
Carl M. Brophy:	Secretary
Patricia C. Smullin:	Assistant Secretary/Director
Patricia D. Smullin:	Treasurer

25. All of WOBI's issued and outstanding stock is owned by a partnership, California Oregon Broadcasting Investments (COBI). COBI's four partners are all members of the William B. Smullin family, and they have the following ownership percentages:

William B. Smullin:	72.29%
Patricia D. Smullin:	2.88%
Carol Anne Brown:	12.26%
Patricia C. Smullin:	12.57%

Carol Anne Brown and Patricia C. Smullin are sisters and the daughters of William B. and Patricia D. Smullin.

26. *Diversification.* COBI, WOBI's sole owner, has the following ownership interests in media of mass communications:

(a) 100% of Oregon Broadcasting Company ("OBC"), licensee of television stations KOBI-TV, Medford, Oregon, and KOTI-TV, Klamath Falls, Oregon. OBC, in turn owns 95% of KAGI, Inc., licensee of AM station KAGI, Grants Pass, Oregon, and 50% of Southwest Oregon Television Broadcasting Corporation, licensee of television station KPIC-TV, Roseburg, Oregon.

(b) 100% of Sacramento Valley Television, Inc., licensee of television station KRCR-TV, Redding, California. Sacramento Valley Television, Inc. in turn, owns 100% of Redwood Broadcasting Company ("RBC"), licensee of stations KEKA and KEKA-

FM, Eureka, California.

(c) 51% of Sacramento Valley Radio, Inc. ("SVRI"), an applicant for a construction permit for a new FM station in Williams, California.

27. The partners of COBI, as individuals, own 100% of the stock of California Oregon Television, Inc. ("COTI"), in the same percentages as their respective partnership interests in COBI. COTI dba Crestview Cable TV owns a number of cable television systems in Crook County, Jefferson County, Wallowa County and Deschutes County, Oregon.[6]

28. *Integration.* WOBI proposes no integration of ownership with management.

29. *Auxiliary Power.* WOBI does not propose to install an auxiliary power generator.

Comparative Coverage

30. The applicants will serve the following areas and populations (60 dBu contours):

Applicant	*Population*	*Area (sq. miles)*
Marrow	8688.6	809,923
Three Cities	879,990	8885.2
WOBI	751,597	7749.9

31. None of the applicants will provide service to a daytime or nightime white are. All three applicants will provide service to a gray area nighttime as well as third, fourth and fifth services nighttime as illustrated in the following chart:

Number of Existing Aural Services

	1		*2*		*3*		*4*	
Applicant	*Pop*	*Area*	*Pop*	*Area*	*Pop*	*Area*	*Pop*	*Area*
Marrow	641	190.4	652	133.1	7,384	604.7	13,782	318.0
Three Cities	1,482	558.6	1.062	327.8	171	392.0	379	101.9
WOBI	212	42.5	222	39.4	5,250	325.7	10,071	242.5

Air Hazard Issue

32. This issue is applicable only to WOBI. The Federal Aviation Administration has found that the proposed WOBI

[6] Principals of WOBI are also officers and/or directors of the entities described above. The precise relationships are set forth in WOBI Ex.1, pp. 3-4.

antenna tower will not be a hazard to air navigation (WOBI Ex. 2).

CONCLUSIONS

33. The only issue involving basic qualifications is the air hazard issue against WOBI. The FAA has determined that WOBI's proposed antenna tower presents no hazard to air navigation (para. 32, *supra*) and the issue is resolved in favor of the applicant. This leaves for decision only the standard comparative issue. The findings establish that WOBI, on a comparative basis, has no realistic chance of prevailing in this proceeding. It is owned by an entity which already has a host of radio, television and cable facilities throughout the West Coast (paras. 26, 27, *supra*); it proposes no integration of ownership in the day-to-day operation of the proposed station; and its coverage proposal confers no comparative advantage. WOBI's comparative deficiencies are so clear that the following analysis is confined to the applications of Marrow and Three Cities.

34. *Diversification of Mass Media.* Marrow has no ownership ties to other media of mass communications. Several of Three Cities' principals have connections with other media, but they seem too minor to be decisionally significant. Alexander Howard, who owns 3.5 percent of Three Cities' non-voting stock, is a director of Continental Cablevision, Inc., and owns less than 1% of its stock.[7] In view of Howard's small ownership interest and passive (non-voting) role in the applicant, his ties with Continental are inconsequential, particularly in view of the distance between Olympia and Continental systems. See *Washington's Christian Television Outreach, Inc.*, 56 RR 1539, 1560 (Rev. Bd. 1984). Similarly, the association of David Rauh and Toni Holm with *OP Magazine* warrants no diversification demerit. The magazine, a bi-monthly publication containing record reviews, has such a small circulation (30 people in Thurston Company; 2300 in the state; and 6,500 nationwide) that its significance as a communications medium is miniscule. Cf. *Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506, 517 (Rev. Bd. 1982) (a "very slight" demerit assessed for ownership in a publication with circulation of 750–1000 in city of license and 14,500 overall). Moreover, pursuant to the intention of its publishers, dating back to 1979, the magazine ceased publication with its 26th issue in November 1984. Realistically, then, the applicants must be regarded for

[7] Continental's closest system is located some 800 miles for Olympia.

comparative purpose as equal under diversification criterion.

35. *Integration of Ownership and Mangement.* Marrow has two stockholders who will participate full-time in the day-to-day operation of the proposed station: Larry Blume (39%) as General Manager and Larry Marrow (15%) as Sales Manager. Three Cities proposes 100% full-time integration: David Rauh (50%) as General Manager and Toni Holm (50%) as Business and Operations Manager. Marrow's contention that this proposal should not be credited because of a debenture sales agreement with six non-voting stockholders who have also subscribed to debentures of the corporation is rejected. The agreement (paras 20–22) contains no restrictions on day-to-day operation or control of the proposed station; rather it consists of general provisions typically designed to afford some degree of protection to non-voting investors in the enterprise. See *Cleveland Television Corp.* v. *FCC*, F.2d 962, 971 (D.C. Cir.1984). Accordingly, Three Cities is credited with 100% full-time integration. *Bradley, Hand & Triplett*, 89 FCC 2d 657 (Rev. Bd. 1982) (non-integration of proposed stockholders did not diminish award of 100% integration credit since 100% of voting stockholders will be integrated).

36. Since the quantitative difference is clear and substantial, 100% for Three Cities and 54% for Marrow, any qualitative difference enhancing the applicants' integration would not be sufficient to alter the clear advantage enjoyed by Three Cities. *Hispanic Owners, Inc.*, FCC 84R-97, released January 7, 1985, para. 30. It is noted, however, that qualitative differences also favor Three Cities. It has 50% female ownership, each of its integrated principals have broadcast experience while Marrow's have none, and in terms of local residence and civic participation, its showing appears comparable to Marrow's.

37. In sum, Three Cities has clearly earned a preference in this area of comparison. *Hispanic Owners, Inc.,. supra; High Sierra Broadcasting, Inc.*, 96 2d 423, 432 (Rev. Bd. 1983).

38. *Comparative Coverage.* The figures set forth in the findings (paras. 30–31) show no major differences between Three Cities and Marrow, but such differences as there are slightly favor Three Cities. It would serve about 70,000 more people than Marrow (a difference of 8%) and while this population is well served in the daytime, Three Cities would serve a nighttime gray area of 1,482 and provide a third service of 1,062 people. The comparable figures for Marrow are 641 and 652, giving Three Cities a distinct advantage in terms of providing service to underserved areas.

Marrow, on the other hand, would provide a fourth and fifth service to significantly larger populations (7,384 vs. 171 and 13, 782 vs. 379).[8] On balance, it is concluded that Three Cities is entitled to a very slight preference since the provision of a second and third service is deemed more significant than provision of a fourth and fifth service to a larger number of people.

39. *Summation.* Three Cities has received a preference for integration of ownership with management and preference of lesser weight for its coverage to underserved areas. It has been judged equal to Marrow with respect to diversification of ownership of mass media, and both applicants propose an auxiliary source of power. WOBI ranks last in every comparative area. Therefore, it is concluded that the public interest would be best served by a grant of the Three Cities application.

According, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Three Cities FM, Inc., IS GRANTED and the applications of Marrow Enterprises, Incorporated, and Washington Oregon Broadcasting, Inc., ARE DENIED.[9]

FEDERAL COMMUNICATIONS COMMISSION

JOHN H. CONLIN, *Administrative Law Judge*

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[8] It is noted that the third applicant, WOBI, serves the smallest population, provides a second and third service to fewer people than either Three Cities or Marrow, and a fourth and fifth service to fewer people than Marrow.

[9] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Common Carrier, International
Submarine Cable
Satellite Communications, International, Policy Re

Report and Order adopting long-term facilities plans for the Pacific Ocean Region for the 1987-1995 time period. Approves the introduction of a fiber optic TPC-3 as early as 1988.
—*Pacific Telecommunications*
CC Docket No. 81-343

FCC 85-457

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Inquiry into the Policies to be Followed in the Authorization of Common Carrier Facilities to Meet Pacific Telecommunications Needs During the Period 1981-1995	CC Docket No. 81-343

SECOND REPORT & ORDER

Adopted: August 7, 1985; Released: August 22, 1985

BY THE COMMISSION:

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I. Introduction

1. This Report and Order concludes the second phase (Phase II) of the major facilities planning process in the Pacific Ocean Region (POR). This second phase was initiated on November 21, 1983 with a Notice of Inquiry (NOI)[1] This was followed by a Further Notice of Proposed Rulemaking (Further Notice) released on March 28, 1985.[2] The second phase of this proceeding focuses on facilities needs in the POR during the 1987-1995 time period and particularly the need for and timing of a fiber optic transpacific cable.[3]

2. In response to the Further Notice, the American Telephone

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[1] Pacific Planning (Notice of Inquiry, Phase II), FCC No. 83-515 (released November 21, 1983).

[2] Pacific Planning (Further Notice of Proposed Rulemaking, Phase II), FCC No. 85-121 (released March 28, 1985).

[3] Phase I of this docket focused on facility needs for the POR for the 1982-1986 time period. *See*, Pacific Planning (Report and Order, Phase I) 47 Fed. Reg. 57040 (December 22, 1982). The first phase of this proceeding focused on issues involving the Australian-New Zealand-Canada submarine cable (ANZCAN). We approved U.S. carrier participation in ANZCAN with a mix of permanent (ownership) and temporary indefeasible right of user (IRU) interests. At that time we envisioned that the short term IRUs held by U.S. carriers in the Canada to Hawaii segment of the cable would terminate in the late 1980's, at which time the traffic would be routed over a fiber optic Haw-4. Additionally, we concluded that an analog Haw-4/TPC-3 in the late 1980's was not in the public interest.

& Telegraph Company (AT&T), Hawaiian Telephone Company (HTC), GTE Sprint, Satellite Business Systems (SBS), ITT World Communications (ITTWC), RCA Global Communications (RCA), MCI International (MCII), and FTCC filed on April 12, 1985 updated country-by-country forecasts for the POR for the period 1987-1995. On April 22, 1985 AT&T and Comsat filed circuit distribution (loading) plans for a number of facility proposals with varying designs and ready-for-service dates. Comsat's submission was based upon a balanced loading methodology, while AT&T used a methodology it calls Modified Economic Loading. Comments were filed on May 6, 1985 by AT&T, Comsat, MCII, GTE Sprint, State of Hawaii (Hawaii), HTC, ITTWC, Department of Defense (DoD), Simplex Wire and Cable Company (Simplex), RCA, the National Telecommunications and Information Administration (NTIA), and SBS. Reply comments were filed by AT&T, Comsat, MCII, ITTWC, NTIA, DoD, Simplex, Hawaii, and GTE Sprint on May 17, 1985.[4]

3. In considering facilities planning questions we analyze a number of factors in order to determine the need for, design and timing of any proposed facility or group of facilities. These factors include demand, the introduction of a new technology, the development of intermodal and intramodal competition, service quality, cost, technological risk, correspondent acceptance, U.S. industrial interests and national security. We believe that a balancing of the factors identified above support the introduction of a fiber optic cable in the Pacific Ocean Region as early as 1988. Thus, we affirm our tentative conclusion that the public interest is best served by the introduction of a fiber optic cable, and particularly the cable described in Plan II-A (Mod. 4), as early as 1988. Below we: (a) identify the current facilities in the region; (b) summarize the NOI and the facility plans submitted in response

[4] On April 29, 1985 Comsat filed a Request for Inspection of Records under the Freedom of Information Act (FOIA), requesting country-by-country traffic forecasts and loading data submitted by AT&T for which AT&T had requested confidential treatment. Accompanying Comsat's FOIA request was a Motion for Extension of Time to file comments in this docket. On May 5, 1985 we denied the request for an extension of time, stating that if Comsat's FOIA request was ultimately granted we would establish a revised pleading cycle. On May 16, 1985 we granted Comsat's FOIA request. In a separate order we stated that additional comments would be due no later than seven days after the documents Comsat requested were made available for inspection, and that additional reply comments would be due fourteen days after the documents were made available. By letter dated May 22, 1985, AT&T indicated its willingness to make the requested information available. The information was thereafter made public on May 23, 1985. On May 30, 1985 Comsat filed further comments and on June 6, 1985 AT&T filed further replies.

to the NOI; and (c) analyze the relevant issues. For each issue we will review our tentative conclusion set forth in the Further Notice, summarize the comments received on the issue and then reach conclusions. After discussing all the issues we will then indicate our final conclusions as to the need for and timing of a fiber optic transpacific cable.

A. Current Facilities

4. Commercial communications between the United States and other countries in the POR are carried via INTELSAT satellites and carrier-owned submarine cables. Currently, approximately 70% of POR traffic to or from the United States is routed over INTELSAT satellites and 30% is routed over submarine cables. Satellite capacity is made available by INTELSAT to the U.S. signatory to INTELSAT, Comsat, and is leased by Comsat to the various U.S. carriers. Alternatively, submarine cables are owned by the U.S. carriers themselves in partnership with their foreign correspondents.[5] Japan, Australia, the Philippines, Korea, Taiwan, and Hong Kong account for approximately 80% of all U.S.-POR traffic, while Japan, Australia and the Philippines account for over 50% of the traffic. There are ten jurisdictions in the region that are currently served only by satellite for U.S. traffic.[6]

5. Satellite capacity in the POR currently consists of an INTELSAT IV-A Primary satellite and an INTELSAT IV-A Operational Spare.[7] In early 1986 both the INTELSAT IV-A Primary and Operational Spare will reach the end of their useful lives and will be replaced with INTELSAT V satellites. In 1987 the INTELSAT V Primary is scheduled to be replaced by an INTELSAT V-A satellite and the INTELSAT V Operational Spare will become solely a spare satellite. Additionally in 1987 an INTELSAT V-A may be placed in the regional as the Major Path

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[5] International communications in countries other than the United States are generally controlled by a government agency. These agencies are known as Post, Telephone and Telegraph administrations (PTTs) and usually have a monopoly over the provision of telecommunication services in the given country.

[6] The jurisdictions in the region served solely by satellite are: Brunei, Peoples Republic of China, French Polynesia, Marshall Islands, Micronesia, New Caledonia, Tonga, American Samoa, Saipan and Western Samoa.

[7] Both the primary and spare satellites are used to carry traffic in an Operational and Operational Spare configuration. However, the total traffic carried on the two satellites does not exceed the capacity of either satellite. The advantage of such a configuration is that path diversity is increased.

satellite.[8] In 1991 the Primary and Spare are scheduled to be replaced by INTELSAT VI (or INTELSAT VI follow-on) satellites. The Major Path satellite is scheduled to be replaced by an INTELSAT VI or INTELSAT VI follow-on) satellite in 1993.

6. There are currently two transpacific cable systems (TPC-1 and TPC-2) serving the region from Hawaii. Hawaii and the U.S. Mainland are connected by three major cables (Haw 1, 2 and 3). With the exception of service to Australia, Fiji and New Zealand via the ANZCAN cable, all other cables providing voice service to the region from the U.S. are saturated. Also, only limited growth remains to carry non-voice traffic over IRC owned cable circuits. Further, many of the major cable systems in the POR will reach the end of their design life during the planning period. Most notably, TPC-1 is scheduled to reach the end of its design life in 1989.[9]

B. The NOI and Proposed Facility Plans

7. The task in the phase II NOI was to obtain the necessary planning information and to compile as complete a record as possible with respect to facilities requirements and alternatives for the region during the planning period. We stated in the NOI that we would consider all available transmission media and viable technological designs as well as methods for circuit multiplication. Additionally, the issues of facilities use and restoration of service were also identified for consideration. Finally, the need for as well as the timing and configuration of the proposed fiber optic TRANSPAC-3 (TPC-3) cable were particularly raised as issues.[10]

8. After the release of the NOI, alternative facilities plans and traffic forecasts were submitted and evaluated by the United States International Service Carriers (USISCs)[11], Comsat and other interested parties.[12] In its filings, AT&T indicated that the

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[8] Under a Major Path configuration, both the Primary and Major Path satellites are used to carry traffic; the Spare is solely a reserve satellite, although it may be used to provide pre-emptible services.

[9] COMPAC was taken out of service in 1984. Other cables reaching the end of their design life during the planning period are: HAW-1 (when Haw-4 is put into service), HAW-2 (1989), SEACOM-1 (1987), SEACOM-2 (1990).

[10] Throughout this order, the use of the term TPC-3 designates the entire group of cable facilities encompassed by Plan II-A (Mod.4) or Plan III (Modified).

[11] The USISCs include AT&T, the International Record Carriers (IRCs) and other service providers including MCII and GTE Sprint.

[12] Comments to our NOI were filed on January 4, 1984 by the State of Hawaii, GTE Sprint and Comsat. Joint comments were filed by the following USISCs: American Telephone and Telegraph Co. (AT&T), Hawaiian Telephone

USISCs and their foreign correspondents favored a fiber optic TPC-3 in 1988. Additionally, AT&T stated that international comity is an essential element of facility planning and must be considered in any facility decisions. GTE Sprint also favored the introduction of TPC-3 in 1988, but cautioned that the circuit forecasts supplied by the carriers should be viewed only as a rough gauge of needed facilities and that there should be flexibility for new carriers to acquire additional circuits in the future. Comsat stated that the Commission must examine closely the need for and timing of any additional facilities during the planning period. Comsat also favored the development of a Master Plan for facilities utilization. The State of Hawaii asked us to examine closely the need for and revenue rquirements associated with any new facility. Further, Hawaii urged us not to authorize any new facilities on the basis of international comity unless those facilities are actually required to meet demand forecasts. Finally, DoD stressed that national defense and security interests require a Guam landing for the TPC-3 cable.

9. In response to the NOI, four different plans were submitted for the introduction of a fiber optic cable into the region, two by the USISCs and two by Comsat. The plan preferred by the USISCs is Plan II-A (Mod. 4). Under this plan a cable would link the U.S. Mainland and Hawaii to Japan and Guam via an underwater branching unit near Guam. Additional cable systems would then be deployed from Japan to Korea to Hong Kong, to the Philippines and back to Guam, creating a ring configuration. Additionally, a branch would be deployed under this plan from the Philippines to Taiwan (see Appendix 1 for diagram). Plan II-A (Mod. 4) calls for the U.S. to Japan, U.S. to Guam and Guam to the Philippines cables to be ready for service in 1988, with the rest of TPC-3 to be operational in 1990 or later. The total first cost of Plan II-A (Mod. 4) is approximately $733 million.[13] AT&T's share is almost 44%, or approximately $320 million. The cost in 1988 dollars is approximately $980 million assuming a 6% inflation rate. AT&T's share in 1988 dollars is approximately $425 million.

Co. (HTC), FTC Communications (FTCC), ITT World Communications Inc. (ITTWC), RCA Global Communications, Inc. (RCA), TRT Telecommunications Corporation (TRT), The Western Union Telegraph Company (WU), and Western Union International, Inc. (WUI). Reply comments were filed on January 18, 1984 by AT&T, Comsat, State of Hawaii, GTE Sprint, RCA, ITTWC, and the Department of Defense (DoD).

[13] First cost is the capital investment associated with a new facility. The USISCs computed first cost in 1983 dollars.

10. The USISCs' secondary proposal, Plan III Modified, would link the U.S. Mainland with Hawaii and Japan. Additional cable systems would then be deployed from Japan to Korea, to the Philippines and to Hong Kong with a connecting cable from Taiwan to the Phillipines. There is no provision for a Guam landing in this plan, and the total cable is of a non-ring design (see Appendix 2 for diagram). The total first cost of this plan is $588 million with a ready-for-service date of 1988 for all but the Philippines-Taiwan cable, which would be operational in 1994. AT&T's share is approximately $225 million. In 1988 dollars the total cost and AT&T's share are $786 million and $300 million, respectively.

11. Comsat's two plans are identical to those of the USISCs with one major difference. Comsat Plan 1A is based upon Plan II-A (Mod. 4) but with a ready-for-service date of 1991 rather than 1988. Plan 2A is the same as Plan III Modified but again with a ready for service date of 1991 rather than 1988.

II. Discussion

A. Demand, Capacity and Demand Flexibility

12. In the Further Notice we stated, "there is little question that satellites committed to the region for East-West traffic when equipped with circuit multiplication techniques can handle the projected traffic and any unanticipated increase in traffic volume without the introduction of a lightguide cable system until at least 1991." Assuming the deployment of a Major Path satellite in 1987 as currently scheduled and the use of circuit multiplication techniques, the total satellite capacity in the region available for U.S.-POR traffic will be about 17,500 circuits, while total U.S.-POR demand, even in 1991, is forecasted to be less than 15,000 circuits. Of course, with existing cable capacity, the total capacity available for U.S.-POR traffic is even greater. Thus, we found that despite a lack of cable capacity in the region, there is no need for the TPC-3 cable on a purely demand basis until at least 1991 if INTELSAT's satellite deployment plans do not change.

13. While not directly disputing our finding of sufficient gross capacity in the region until at least 1991, most commenters argued that gross capacity alone is not determinative of the need for the cable in 1988. AT&T and others argued that cable and satellite circuits are not always fungible and that an unfilled

demand exists for cable circuits regardless of adequate gross capacity. SBS stated that the digital capacity of TPC-3 is needed given the growth of Integrated Services Digital Networks (ISDNs). TPC-3, according to SBS, would prevent double satellite hops as more of the domestic portion of traffic is routed over satellite. ITTWC commented that 80% of its circuit needs for the POR are for private line services and that customers using private lines prefer cable facilities over satellite facilities. AT&T indicated that stated demand forecasts in the proceeding are conservative and that due to such factors as greater reliability and security, reduced absolute delay, and lower interference and error rates, a lightguide cable may be preferred by customers over existing analog cables and satellites, thus spurring growth in excess of that forecasted.

14. Both Comsat and the State of Hawaii, in their comments, stated that the Commission in the Further Notice failed to give adequate weight to the elements of demand and the efficient use of facilities in our decision-making process. Hawaii argued that facilities decisions have traditionally been based overwhelmingly on demand considerations. Comsat asserted that under balanced loading TPC-3 will be only 20% utilized in 1995. Both indicated that if a ratepayer supported TPC-3 was not required on a demand basis until 1991, it should not be built until that time.

15. In its reply comments AT&T argued that excess satellite capacity is not the fault of customers, the USISCs or foreign correspondents, and that the cable should not be delayed merely because INTELSAT has chosen to construct larger than necessary satellites. Further, it argued that Comsat's 20% load figure for TPC-3 in 1995 is incorrect because it fails to take into account the needs of USISCs other than AT&T as well as those of purely foreign users. Comsat, in its reply, questioned whether the stated demand forecasts are all that conservative given the fact that the submitted forecasts translate into a compound growth of 18.1% per year for eleven years.

16. The analysis found in the NPRM that existing and planned capacity would be sufficient to handle forecasted demand through 1991 assumed the introduction of INTELSAT-VA satellites into the POR in 1987 as the Primary and Major Path satellites, the retention of an INTELSAT-V satellite as the spare, and the use of CFDM and 64 Kbps TDMA/DSI. It is now less clear that these assumptions are valid. Specifically, the INTELSAT-VA satellites earmarked for POR use will be transferred to the POR from the Indian Ocean Region (IOR). This transfer is scheduled to occur

when INTELSAT-VI satellites are launched into the Indian Ocean Region for Primary and Spare satellite roles. It now appears that the INTELSAT-VI satellites may not be placed in the IOR until 1988 and perhaps as late as 1989. Thus, the redeployment of the INTELSAT-VA satellites into the POR could also take place as late as 1989. These delays are attributable to a variety of factors including manufacturing delays, satellite design modifications and availability of launch vehicles. Also, it is less clear that a Major Path satellite will be placed in the POR. Launch or satellite failures, demand and service requirements and other factors may cause INTELSAT to alter its plans to place (or when to place) a Major Path satellite in the region. Further, only two of the INTELSAT-VA satellites and none of the INTELSAT-VI satellites have been launched. Thus, there is a possibility that launch or operational failures could impact eventual deployment of INTELSAT-VA satellites into the POR. Finally, it is not clear that all Signatories will meet their earth station equipment implementation schedules to install advanced modulation equipment as scheduled. Depending on the satellite configuration employed by INTELSAT and the rate of advanced modulation equipment installation by the region's Signatories, available satellite capacity for 1988 could range from 4350 to 17,500 circuits. Satellite demand in 1988, without a TPC-3, is forecasted to be 6450 circuits. Thus, while the INTELSAT-VA satellites may be deployed in the POR in 1987 as the Primary and Major Path satellites, there is a real possibility that these satellites will not be deployed as previously assumed and that a demand requirement for TPC-3 as early as 1988 may materialize. We also note that satellite and cable circuits are not necessarily fungible for private line and data services, particularly those for which security is essential and for which the lowest possible interference and error rates are required. Because most of the cables in the region are saturated, TPC-3 may be necessary to fulfill the explicit demand for cable circuits for these types of services. While it is not impossible that on purely a demand basis a ready for service date of 1991 would still be appropriate, the number of planning variables and our preference to avoid service disruptions caused by saturated facilities lead us to conclude that a TPC-3 as early as 1988 to satisfy forecasted demand would be in the public interest.

B. New Technology

17. The introduction of a lightguide cable system in the POR would introduce digital, fiber optic submarine cable technology into the region for the first time. Such a cable would, at some future date, become part of a globally interconnected digital network. Thus, in the Further Notice we tentatively found that the introduction of a new technology into the region at the earliest practical date (as early as 1988) would be in the public interest.

18. Many of the commenters supporting a TPC-3 in 1988 cited the new technology it would introduce as support. AT&T and ITTWC cited a number of factors including reduced noise, error and absolute delay as support for their belief that a lightguide cable is better suited than satellite for certain services such as high speed data. The State of Hawaii argued that innovative and technologically sophisticated facilities are desirable only if they provide users with services they need at rates they can afford. Comsat commented that digital services already exist, via satellite, to all points in the region and that International Business Service (IBS), a satellite delivered data service, will be available in the region in 1987. Further, Comsat pointed out that due to a lack of digital connecting cables, digital cable services would be available to only Japan, Guam and the Philippines in 1988.

19. There is no doubt that world communications are rapidly becoming digitalized. The planned TPC-3 cable would clearly become an integral part of a worldwide digital communications network. At the same time we believe that satellites can offer most, if not all, services to be offered on TPC-3. However, due to reduced noise, error and absolute delay relative to satellite, there may be some services such as high speed data which are slightly better suited to cable than to satellite. Additionally it appears that many private line customers prefer cable to satellite, and may prefer fiber optic to analog cables. We believe that customers should, to the maximum extent practicable, have a choice of transmission medium. It is true that the TPC-3 cable will initially serve only a limited number of points. However, as TPC-3 is completed and connecting cables are built, it will quickly grow to serve the bulk of the Pacific Ocean Region effectively and efficiently. We therefore conclude that a fiber optic cable as early as 1988 would promote technological development and customer choice.

C. Intermodal and Intramodal Competition

20. In the Further Notice we tentatively concluded that the introduction of TPC-3 will increase intermodal competition, thus promoting efficiency and creating a downward pressure on rates. Additionally, we tentatively concluded that intramodel competition will be increased because carriers preferring cable technology will have additional capacity to provide competing services.

21. Most of the commenters discussing intermodal competition supported our tentative finding that such competition would be increased with the introduction of TPC-3 in 1988. Of note was AT&T's comment that if TPC-3 is deferred until 1991, 90% of the POR traffic will be on satellite by the year 1990. However, both the State of Hawaii and Comsat argued that intermodal competition will not be improved with the introduction of TPC-3 in 1988. Hawaii, in its reply comments, stated that it fails to see "how this benefit [intermodal competition] can be effectively realized in light of the involvement of foreign correspondents, the existence of loading requirements and the fact that satellite facility plans are already fixed through 1991." Comsat argued that a TPC-3 in 1988 would threaten the continuation of cost-effective service on all except non-cable routes, thus creating a barrier to intermodal competition. Further, Comsat stated that because satellite planning is fixed through 1991, any traffic diverted from satellites during this period will have the effect of driving up rates.[14]

22. We continue to believe that intermodal competition will be increased with the introduction of TPC-3. Currently, over 70% of all traffic in the POR is routed over satellite, and all growth, with the exception of traffic to Australia and New Zealand, must be placed over satellite circuits. With the introduction of TPC-3, submarine cables will once again become a competitor for new traffic growth in the region. While there is no question that the existence of foreign correspondents and loading, diversity and restoration considerations may limit the degree of intermodal competition that can currently be introduced into the market,[15] the introduction of a third transpacific cable will achieve signifi-

[14] Comsat indicates that its space segment revenue requirement, in the short run, is not affected by changes in satellite demand. Thus, Comsat argues, if the demand for satellite circuits declines, the revenue requirement will simply be spread across fewer circuits resulting in a higher per circuit charge.

[15] While perhaps limiting the degree of intermodal competition, loading guidelines also assure the reasonable use of satellite facilities by recognizing Comsat's (and INTELSAT's) dependence on AT&T traffic and AT&T's bias toward cable, unrelated to relative efficiencies.

cant movement toward a more competitive facilities marketplace. We do not believe that the introduction of TPC-3 will threaten cost-effective satellite service. As Comsat itself has stated, the initial reach of the cable will be limited to only relatively few landing points.[16] Thus, until the full cable system is built, Comsat will continue to carry all growth traffic to most POR markets and a substantial percentage of growth traffic to all POR markets. Additionally, the Commission will continue its loading policies to insure a reasonable use of facilities.

23. There was almost no discussion of intramodal competition in the comments that were filed. We continue to believe, however, that intramodal competition will be increased with the introduction of TPC-3. This is because those carriers desiring cable circuits but presently unable to obtain them will have them available for use. Therefore, we conclude that a fiber optic cable in the POR would increase both intermodal and intramodal competition, and that the public interest would be furthered by the introduction of such competition at the earliest possible date.

D. Service Quality

24. We tentatively concluded in the Further Notice that a transpacific cable based upon Plan II-A (Mod. 4) would be most advantageous from a service quality and reliability standpoint. In discussing service quality there are a number of factors to be examined, including path diversity, restoration, media diversity and loading. We discuss each of these in detail below.

25. *Path Diversity.* Path diversity concerns the number of independent routes that carry traffic to a given correspondent. Path diversity is closely related to the ability to restore circuits in case of a facility failure. The more facilities serving a given location the better the ability to restore one that fails. In the Further Notice we tentatively found that a TPC-3 as early as 1988 with a ring configuration would enhance path diversity by adding another major route to the two satellite (primary and operational spare or primary and major path) and three cable paths (TPC-1, TPC-2, and ANZCAN) already serving the POR.

26. Comsat, in its comments, argued that path diversity is improved from 1986-1990 even if TPC-3 is delayed until 1991. Both Comsat and AT&T used as a measure of path diversity the percentage of traffic that is carried on the most used path to a

[16] We must note, however, that the cable is scheduled to serve Japan and the Philippines, two of the largest POR markets, in 1988.

given country. For the five largest correspondents, Comsat calculated that traffic on a given path never exceeds 50%, and the percentage of traffic carried on the largest path decreases for Australia, Japan, Korea, the Philippines and Taiwan from 1986 to 1990 even without the introduction of TPC-3. AT&T in its reply comments argued that path diversity with TPC-3 in 1988 is better than with TPC-3 in 1991 until 1994 at which time they reach the same level of diversity. Further, AT&T commented that path diversity is at least 12% better to Japan, Korea, the Philippines and Taiwan if TPC-3 is constructed in 1988 and not delayed until 1991. ITTWC agreed with our tentative finding that TPC-3 in 1988 would increase path diversity, and stated that a ring configuration would be preferable from a path diversity standpoint.

27. An increase in path diversity is frequently the natural consequence of the introduction of another facility into the region. While it may be true that path diversity will increase without a fiber optic TPC-3 until 1991, we find based on the filings of AT&T and Comsat that path diversity will increase even more with a TPC-3 in 1988.[17] We therefore conclude that TPC-3 as early as 1988 will result in a beneficial increase in path diversity.

28. *Restoration.* Restoration pertains to the ability to maintain service if a facility outage should occur. The issue presents itself in two ways. The first is the degree to which a TPC-3 would enhance the restoration of other facilities in the POR. In the Further Notice we tentatively found that, because a lightguide cable would be able to restore TPC-1 and TPC-2 and also satellite services (on a geographically limited basis), a TPC-3 would enhance the restoration of existing facilities.

29. The second restoration issue pertains to how TPC-3 itself would be restored in case of failure. Plan III Modified would be restored completely by satellite as would Plan II-A (Mod. 4) east of the branching unit. However, the ring configuration of Plan II-A (Mod. 4) would allow it to be self-restoring west of the branching unit.[18] In the Further Notice we found this self-restoring capability to be a significant advantage.

30. Many of the parties supporting the introduction of TPC-3 in 1988 cited the self-restoring capabilities of Plan II-A (Mod. 4)

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[17] However, the routing of too much traffic on any one path (cable or satellite) does not promote diversity, although such routing may be beneficial for other reasons.

[18] The actual restoration capability west of the branching unit would be determined by the amount of idle capacity existing at the time of the failure within the ring.

as one of its major benefits. Comsat, however, questioned how restoration capability is improved given the fact that there is currently 100% restoration capability in the region via satellite. Further, Comsat pointed out that restoration of TPC-1 and TPC-2 by TPC-3 would require analog to digital conversion equipment, the cost of which is unknown.

31. We continue to believe that restoration capability will be improved in the region with the introduction of a transpacific lightguide cable based upon Plan II-A (Mod. 4) in 1988. Such a cable offers a number of restoration advantages. Foremost, the ring design would allow the cable to be self-restoring, in part or in whole, west of the branching unit. We consider this to be a major advantage because it will allow greater flexibility than satellite restoration alone can offer. Further, if as several commenters stated, there are a number of services that can be offered over a fiber optic cable that cannot be offered over satellite circuits, then the self-restoring capability becomes a critical feature because it will represent the only means of restoring those cable-only services. We also consider TPC-3's ability to restore a digital satellite services, albeit on a geographically limited basis, to add more flexibility to restoration planning. Finally, although conversion equipment would be necessary, the use of a fiber optic TPC-3 to restore the analog TPC-1 and TPC-2 cables is a useful restoration option.

32. We asked, in the Further Notice, not only for the USISCs to present specific plans as to how TPC-3 would be restored but specifically whether a TPC-4 will be needed at some future date substantially for restoration purposes. No party anticipated a TPC-4 primarily for restoration purposes. Thus, given the high reliability claims for TPC-3 espoused by various parties, as well as the ability of satellites to restore all, or nearly all, TPC-3 traffic, we do not now anticipate a need for a ratepayer supported TPC-4 which is not substantially justified on demand forercasts.

33. *Media Diversity.* In the Further Notice we tentatively found that media diversity would generally be enhanced by the introduction of a fiber optic transpacific cable. While we took no position on what a preferable cable/satellite ratio would be, we noted that approximately 70% of all traffic and almost all growth traffic is currently routed over satellite. We found that a fiber optic TPC-3 would especially enhance media diversity because high speed data and other wideband services that are currently available only over satellite circuits could be carried over it.

34. There was a general lack of discussion in the filings regarding media diversity. ITTWC and GTE Sprint supported the Commission's tentative findings with respect to media diversity. Comsat, on the other hand, questioned whether a slight increase in media diversity warrants the building of a very expensive cable facility.

35. We confirm our finding that media diversity is increased with the introduction of TPC-3. Comsat's own figures show that in 1990 for the four largest correspondents to be served by TPC-3, media diversity is at least 24% better with the cable in service in 1988 rather than 1991.[19] We find this to be a significant improvement. Thus, improved media diversity would be achieved by a TPC-3 as early as 1988.

36. *Loading*. Circuit distribution (loading) is the method by which the Commission directs the placement of U.S. traffic on the different media to assure the reasonable use of both satellite and cable facilities and the development of intermodal competition.[20] A loading methodology promotes the efficient use of satellite and cable facilities in the region. While we expect that as competition develops in the POR, AT&T's incentives will increasingly be driven by economic efficiency, a loading plan now offsets AT&T's present incentives to use cable rather than satellite circuits. The imposition of a loading methodology also recognizes the great reliance that Comsat (until recently limited to being a carrier's carrier) and INTELSAT place on AT&T for traffic and revenues. Thus, a loading methodology assures that Comsat receives an adequate amount of traffic from AT&T, which is not only the largest U.S. carrier in the region but also the largest owner of cable facilities.

37. To date a balanced loading methodology has been used for the placement of AT&T's IMTS circuits in the POR. Balanced loading is a feature of the master plan formulated by AT&T and Comsat under general guidelines established by the Commission in this proceeding.[21] Under such a plan, traffic growth is divided among available cable and satellite paths on a country-by-country

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[19] Comsat uses the percentage of traffic on satellite to a given country as an index of media diversity. Thus, the percentage of traffic over satellite to Japan in 1990, for example, is 58% with TPC-3 in 1988 and 82% if TPC-3 is delayed until 1991.

[20] For a detailed description of loading issues *see*, Inquiry into the Policies to be Followed in the Authorization of Common Carrier Facilities to Meet North Atlantic Telecommunications Needs During the 1985-1995 Period (Second Report and Order), FCC No. 85- , released August , . [North Atlantic Loading Report and Order]

[21] Pacific Planning, *supra* note 3, 47 Fed. Reg. at 57045-46.

basis.[22] Since the existing East-West cables other than ANZCAN are basically saturated, almost all traffic growth in the region has been placed on satellite. However, once TPC-3 is ready for service, both cable and satellite capacity will be available to carry growth traffic. It is at this time that a loading methodology becomes operationally and financially important.

38. In the Further Notice we expressed our desire to move away from a prescribed loading methodology. We stated, however, that we cannot rely on market forces alone to drive circuit activation decisions until such time as effective carrier and facility competition exists. As this point has not yet been reached, we stated that it would be best to develop a loading policy concurrently with our long-range facilities planning for the region. This will allow those building and investing in POR facilities to make reasoned and knowledgeable choices. We set forth, in the Further Notice, a number of possible loading options. These included a continuation of balanced loading under a master plan, a phase-in plan moving away from balanced loading under a master plan, as well as the NTIA plan.[23] We indicated an inclination to continue the existing exemption from any methodology for providers of record services, and to extend this exemption to new entrants and IMTS providers other than AT&T. Thus, any methodology would apply only to AT&T.

39. A large number of the comments we received dealt with the issue of loading at some length. The comments generally revolved around which carriers and services should be subject to loading, what loading methodology the Commission should adopt, and how long the Commission should continue to be involved in loading decisions. Additionally, Comsat questioned whether the Commission has sufficient information to reach any conclusions as to loading in the region.

40. All those commenting on the issue were in agreement that any loading methodology that we adopt should apply only to AT&T. There was some disagreement, however, as to which of AT&T's service offerings should be subject to loading. ITTWC argued that, based upon AT&T's greater resources and possible

[22] Presently, AT&T and HTC are the only carriers subject to the loading standards of the master plan. All other carriers have complete loading flexibility since they use relatively few circuits, their circuit choices are subject to customer choice or their service offerings are subject to significant competitive pressures. (HTC's private line circuits are also exempted from specific loading methodology.)

[23] *See* paragraph 48, *infra*, for a discussion of the NTIA plan.

anti-competitive pricing, all of AT&T's services should be subject to loading. AT&T replied that because non-IMTS services are competitive, loading should apply only to IMTS. GTE Sprint suggested, and MCII agreed, that AT&T's 800 Service-Overseas should be subject to loading guidelines since AT&T is the only provider of this service and the service uses the IMTS network.

41. Five basic loading methodologies for AT&T's IMTS circuits were put forward in the comments; modified economic loading by AT&T, the NTIA plan, a multi-tier plan by GTE Sprint, a nine year transitional phase-in plan by ITTWC and a continuation of balanced loading by Comsat.

42. AT&T put forth a loading plan it calls "modified economic loading." This methodology, according to AT&T, compares "the economic per-circuit costs to the carriers, *i.e.*, the projected tariff charge for a satellite circuit, and the comparable annual carrying costs for a cable circuit." AT&T also stated that there will be no off-loading of satellite circuits, and that a reasonable level of media diversity will be maintained. Further, under the AT&T plan, any shortfall or excess in traffic will be apportioned between cable and satellite based upon their relative distribution percentages in the loading plan for the year. Finally, AT&T stated that any loading guidelines should end at year-end 1990.

43. With respect to AT&T's loading plan, Comsat stated that it had serious reservations about modified economic loading. It argued that this would amount to a three year freeze on satellite usage growth, and that a 5-6% per year decline in relative satellite usage under modified economic loading would be unreasonable. Finally, Comsat stated that loading guidelines should not automatically end at year-end 1990. Rather, Comsat argued that loading should extend through 1995 because the full fiber optic network will not be established until the mid-1990's and because the large cable circuit capacities that will be available in the region make loading even more important.

44. ITTWC proposed a nine year transition methodology. Its plan calls for five years of balanced loading after which overall loading flexibility would gradually be increased by up to 2% per year. According to ITTWC, this would allow AT&T to route approximately 60% of all growth traffic over cable circuits during the planning period, and would result in a 49/51 cable/satellite ratio in 1995. ITTWC argued that a transition period avoids drastic usage alterations, prevents off loading and protects existing investments. ITTWC also stated that it believed that loading should not automatically end at year-end 1990, but rather

when the Commission finds that sufficient competition has developed in the international marketplace.

45. AT&T stated that ITTWC's nine year transitional period was too long and "represents an artificial restraint that benefits competitors at the expense of AT&T." NTIA argued that 2% per year loading flexibility would not make the market more competitive but would merely exchange one ratio (70/30) for another (51/49).

46. GTE Sprint supported a two-tier loading plan. This approach was first suggested by the Commission in the Notice of Proposed Rulemaking on North Atlantic loading.[24] Under this methodology more loading flexibility would be granted for AT&T's traffic to those countries that have entered into multiple operating agreements for IMTS service. In this way, GTE Sprint argued, PTTs will be encouraged to grant operating agreements to IMTS providers other than AT&T. Specifically, GTE Sprint proposes that AT&T be granted as an upper tier, 2% per year loading flexibility for those countries in which IMTS competition exists.[25] GTE Sprint proposed that balanced loading would apply to those countries without IMTS competition as a lower tier.

47. AT&T argued that a two-tier plan such as the one supported by GTE Sprint is likely to be counterproductive by hardening opposition to competition among foreign countries, is of limited flexibility, and is likely to be unfair to those countries with small traffic volumes which have less incentive to deal with more than one U.S. carrier. MCII called GTE Sprint's plan "unabashedly self-serving." Further, MCII pointed out that in addition to MCII, AT&T and Comsat opposed a similar proposal in the North Atlantic.[26] MCII argued that multiple suppliers do not necessarily equal effective competition, and that operating agreements are best left to negotiation between carriers and their foreign correspondents. Finally, Comsat and AT&T agreed that

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[24] *See*, North Atlantic Planning (Further Notice of Proposed Rulemaking), FCC 85-176, released April 22, 1985.

[25] GTE Sprint proposes that the trigger mechanism for allowing AT&T greater loading flexibility should be that "the country in question must sign operating agreements with the major International MTS competitors." It proposed that presently, GTE Sprint and MCII should be considered major competitors and that the Commission could adopt standards to designate other carriers as major competitors.

[26] In the North Atlantic Loading proceeding AT&T characterized the two-tier methodology as "unworkable" and likely to lead to unfair consequences, especially for countries with small traffic streams. Comsat argued that the burden of new entrants would be placed on it. Further, Comsat stated that the two-tier methodology suffers from severe definitional problems.

any loading methodology adopted should be applied to all countries.

48. The NTIA loading proposal attempts to simulate a market without facility biases. It requires the Commission to determine annually the relative revenue requirement for cable and satellite circuits in a particular region on a per circuit basis and then use these numbers to determine loading requirements in a cost effective manner. In theory, under the NTIA plan the more efficient medium will be given a larger share of the traffic in the region. NTIA stated that it would not be opposed to an interim loading plan of 2% per year while the Commission is developing a cost-based methodology to implement its proposal.

49. AT&T stated that the NTIA loading proposal is comparable to an economic loading approach. However, AT&T argued that the NTIA plan would result in a "regulatory quagmire" involving elaborate Commission involvement and limited loading flexibility. Comsat stated that it still has doubts about the NTIA proposal and that it should be subject to further review and refinement.

50. Comsat argued here, as in the North Atlantic, that balanced loading is the best methodology to use for loading circuits. Comsat stated that balanced loading yields service reliability benefits and apportions the risk of excess capacity evenly between cable and satellite. AT&T argued that balanced loading does not give it sufficient flexibility and also does not decrease at a fast enough rate the high cable-satellite circuit distribution gap that currently exists in the POR. It has also been argued that balanced loading does not encourage Comsat or INTELSAT to be cost efficient and that it does not encourage intermodal competition.

51. The issues surrounding loading are extensively discussed in the Report and Order, adopted today, which discusses loading policies for the North Atlantic region. In that proceeding we determined that loading guidelines will only be prescribed for circuits used by AT&T to provide U.S.-CEPT message telephone and allowed AT&T up to 2% per year flexibility in its placement of these circuits on either cable or satellite facilities for the period 1986-1988. This approach would permit AT&T to route approximately 63% of all growth traffic over cable. Any loading methodology adopted must take into account the specific facts and conditions that exist in the region. Thus, the exact methodology found to be appropriate in the North Atlantic region may not necessarily be appropriate in the POR. Among the important differences between the regions are traffic levels, Commission

acceptance for the 1982–1986 period of a carrier-proposed master plan in lieu of government-mandated requirements, and as well as the difference in the level of carrier and facility competition that currently exists.

52. The loading policy we adopt today for the POR applies only to circuits used by AT&T to provide IMTS and 800 Service-Overseas.[27] We have concluded that it is not necessary to include in any loading prescription circuits used to provide record services, circuits used by new entrants to provide service, or circuits used by any carrier other than AT&T to provide IMTS, because of the relatively small number of circuits involved, the ability in many instances of the user to designate the medium, and the competitiveness of many of these services. *See*, North Atlantic Loading Report and Order at paragraphs 42–47. AT&T accounts for a large majority of the total circuits used in the region. For example, it is forecasted that in 1987 AT&T will use over 75% of the U.S.-POR circuits. Additionally, AT&T's IMTS accounts for almost all of its circuit use. Thus, until such time as a marketplace mechanism is sufficiently developed to distribute U.S.–POR IMTS circuits, it remains necessary for the Commission to require a loading methodology that insures efficient use of all facilities. Further, we believe it is appropriate to include AT&T's 800 Service-Overseas in any loading plan since the service is provided over the same switched network as IMTS.[28]

53. Until such time as there is adequate carrier and facility competition in the region it will be necessary for the Commission to require a loading methodology. Thus, we will not set an automatic ending date for loading as AT&T suggests. At the same time, however, we recognize that international telecommunications industry is now in the midst of a transition period toward a more competitive environment. For this reason the loading plan we adopt today runs for five years from January 1, 1987 through year-end 1991. The timeframe for the initial loading guidelines in both regions do not necessarily bear any relationship to the overall time period that loading guidelines will be in force. Prior to year-end 1991 we will revisit the loading issue to determine

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[27] Any reference to AT&T's IMTS in the discussion of loading shall apply to AT&T's 800 Service-Overseas as well, and the circuits used for 800 Service-Overseas may be aggregated with the IMTS circuits. The loading policy prescribed here shall be employed by AT&T as of January 1, 1987.

[28] We are exempting AT&T's private line service from loading because it is subject to the same marketplace distribution mechanisms as are other carriers providing leased channels. *See*, North Atlantic Report and Order at paragraph 44.

what loading approach, if any, is required for the duration of the planning period.[29]

54. *Balanced Loading.* We believe that balanced loading will not be the most desirable methodology for use in the POR. It is true that balanced loading is a predictable and automatic loading technique that requires little active Commission involvement. It does not, however, create the proper economic incentives for Comsat, INTELSAT or foreign administrations. We are not persuaded that guaranteeing Comsat a traffic share of 59% or more throughout the period (as would be done under balanced loading) provides strong enough incentive to Comsat and INTELSAT to plan, build and operate efficient and cost effective facilities. It may also not encourage Comsat to enter the IMTS market or to compete more vigorously for IMTS traffic. Further, a balanced loading plan provides no incentives to foreign administrations to enter the operating agreements with additional U.S.-IMTS carriers. Thus, we do not now adopt a balanced loading methodology for circuit distributions in the POR during the 1987-1991 time period.

55. *NTIA Plan.* We believe that the NTIA cost-based circuit distribution methodology could provide a number of benefits including the development of a competitive, unbiased facilities marketplace. We retain our concern, however, that the NTIA proposal is not fully defined, that it could require a substantial and continued level of Commission involvement in loading decisions and that it could complicate facilities planning by the carriers, their correspondents, Comsat and INTELSAT. *See*, North Atlantic Report and Order at paragraphs 52-56. Thus, we cannot conclude now that NTIA's plan be adopted for loading decisions in the region during the 1987-1991 period.

56. *GTE Sprint Multi-tier Plan.* We conclude that we should not adopt a multi-tier loading methodology for the POR. While we are concerned about the slow progress being made in the POR in the acquisition of operating agreements, a multi-tier approach is more complex and may require more Commission involvement in loading decisions than the phase-in methodology we are adopting. Further, the multi-tier proposal remains ill-defined in many respects. Areas of concern include the handling of countries with small traffic streams, what the correct trigger mechanism should be as well as the correct definition of the lower and higher tiers. For these reasons we are not convinced that it is the best

[29] We retain, of course, the ability to modify the timeframe or the methodology we are adopting if circumstances warrarnt.

approach for the POR at the present time. However, as the loading guidelines to be used will expire prior to the end of the planning period and will be revisited prior to year-end 1991, the multi-tiered loading methodology may be further studied at a later date.

57. *Modified Economic Loading.* AT&T proposed a plan which it states is based upon the relative costs of satellite and cable circuit use. AT&T has provided us with no showing of how the plan was actually derived. Thus, while we assume this plan to be AT&T's preferred loading methodology, we attach no other significance to it. We believe that in a non-competitive marketplace, the AT&T plan may not provide the most efficient and cost effective use of facilities in the region. Further, although POR traffic streams are not as large as those in the North Atlantic, AT&T's proposal may result in an upward pressure on Comsat's rates, and would adversely affect the development of intermodal competition.[30] Thus, we do not adopt modified economic loading as the loading plan for the region for the 1987–1991 period.

58. *ITTWC Phase-in Plan.* The phase-in plan put forth by ITTWC has a number of drawbacks. Foremost among these is that the phase-in time period may be too long and the flexibility gained may be too slight. Phase-in plans in general, however, are attractive as they provide an orderly transition from balanced loading to a loading plan with increased flexibility. Thus, the loading plan we adopt today for the POR is similar to that adopted in the North Atlantic.

59. While we believe that a gradual phase-in of loading flexibility is useful in the POR, we have made adjustments in the exact mechanics of the phase-in plan to fit the unique facts of the region. The most important difference between the North Atlantic and Pacific regions for loading purposes is the way in which the different media are currently loaded. In the North Atlantic the

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[30] *See*, North Atlantic Loading Report and Order. In that proceeding we employed a methodology to attempt to calculate the effect that various loading schemes would have. We found there that, if Comsat's space segment revenue requirement is fixed, the fewer circuits that are placed on satellite the higher the space segment charge per circuit. For the POR we estimate that the revenue decrease for Comsat from using modified economic loading as compared with balanced loading, assuming a constant bundled space segment charge of $1060 per circuit per month, would be almost $12 million through 1991. (*See*, Appendix 3). In terms of rates, we do not believe that the number of circuits in this region are so great as to have an unreasonable or traumatic impact on Comsat's actual global rates. Nevertheless, on a regional basis the traffic diversion and rate/revenue differentials are not inconsequential and support our conclusion to adopt a phase-in proposal less severe than the one proposed by AT&T.

current cable/satellite ratio is 48/52. Thus, in the North Atlantic we adopted a plan allowing 2% flexibility per year for three years. In the Pacific the ratio is currently 30/70 changing to approximately 24/76 in 1987. Thus, we are adopting for years two through five, a regional plan allowing 8% flexibility in 1988 and then 4% for the next three years.[31] This allows an average about 65% of all traffic growth to be routed over cable for the years 1988–1991 and results in a more balanced cable/satellite ratio of 44/56 in 1991.[32]

60. We allow a large percentage of flexibility in 1988 as it is the first year TPC-3 will be ready for service and the loading ratio at that date will be highly favorable to satellite interests. Also, while 8% flexibility appears to be a large change, it actually is very close to the levels that would be reached under either AT&T or Comsat's preferred plans for that year. There is no evidence that the loading plan we are adopting will have a detrimental effect on Comsat, INTELSAT or ratepayers.[33]

E. Cost Analysis

61. In the Further Notice we tentatively concluded that delaying the cable until 1991 could result in lower international rates for users stemming from a lower overall revenue requirement which users are required to support.[34] We were unable to

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[31] Under any loading plan approximately 76% of all traffic will be placed on satellite in 1987 because TPC-3 will not yet be in service so that there will be no cable capacity (other than ANZCAN) on which AT&T will be able to load any quantity of traffic. The loading plan we are adopting gives the following year-by-year cable/satellite ratios: 1987: 24/76; 1988: 32/68; 1989: 36/64; 1990: 40/60; 1991: 44/56. We will require AT&T, as well as all other U.S. TPC-3 co-owners, to file a regional loading plan for the 1987–1991 period with its Section 214 application to build TPC-3, based upon its most recent traffic forecasts and in conformance with this loading methodology. Further, we shall require all U.S. TPC-3 co-owners to retain traffic loading data on a country-by-country basis for the 1987–1991 period. Such data may be requested by the Commission during its consideration of future loading policies. Finally, all U.S. TPC-3 co-owners shall also file country-by-country loading plans for the TPC-3 facility with their Section 214 application so that we may authorize both the building of the cable and the activation of the circuits therein.

[32] The yearly loading flexibility will be cumulative in nature. As in the North Atlantic, we will not allow deloading of circuits once they have been activated on a particular transmission medium.

[33] For the five year period, we estimate that the revenue difference for Comsat from using the phase-in plan rather than balanced loading, assuming a constant bundled space segment charge of $1060 per month per circuit, would be approximately $5.5 million. This is less than fifty percent of the difference between balanced loading and modified economic loading. (*See*, Appendix 3).

[34] Rates to customers are established to recover, in a fair and reasonable way, a specific overall revenue requirement. A revenue requirement is made up of two

determine exactly how much would be saved through deferral, although in response to the NOI the USISCs and Comsat, using different methodologies, approximated the savings to be $33 million and $120 million, respectively, over the planning period. We also reached no conclusion as to the total service costs associated with the various facility plans put forth by the parties. We determined that none of the costing methodologies used by AT&T or Comsat accurately reflected costs.

62. AT&T and Comsat, in their comments and reply comments in response to the Further Notice, discussed at great length the issue of cost. Comsat indicated that deferral would result in a savings of $193 million in 1988 dollars. AT&T, in its reply comments, pointed out that Comsat omitted a number of costs associated with delay, including higher construction costs due to inflation, the continued use of ANZCAN circuits, and lost transiting revenue.[35] AT&T found that if the cable is delayed until 1991, there will be additional costs of $365 million. Additionally, AT&T took issue with Comsat's cost estimates for added satellite use if the cable were delayed. Due to the operational preference of not off-loading traffic from one medium to another, AT&T argued that any traffic routed over satellites due to delay of the cable would remain on satellite at least until the end of the planning period, resulting in higher expenses until at least 1995.

63. Simplex stated that the Commission's tentative finding of lower costs to the ratepayer if the cable is delayed is "correct in an abstract, theoretical sense [but] it is oversimplified and not useful in the present context." Simplex argued that there was no evidence that costs will decrease over time, especially when inflation is favored in. ITTWC commented that TPC-3 could give its customers lower rates because the per circuit costs of TPC-3

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factors — the return on investment, and expenses (including taxes and depreciation). The return on investment of a carrier consists of a certain allowed percentage (rate of return) applied to the net book value of the facilities owned by that carrier which are used and useful in the provision of communication services. For example, if AT&T's share of the proposed TPC-3 cable is $425 million (of a total of approximately $980 million), the associated revenue requirement would be about $100 million. This includes a return on investment of about $54 million (12.785% X $425 million) and about $46 million in taxes and other expenses. Thus, if Comsat's revenue requirement is relatively fixed and a TPC-3 would be added to AT&T's rate base and reflected in AT&T's revenue requirement, then the total revenue requirement which ratepayers must support is increased upon the introduction of TPC-3 (or any other new facility).

[35] AT&T estimated the costs due to the continued use of ANZCAN circuits to be $33 million and foregone transiting revenues to be $12 million if the cable is delayed until 1991.

are lower than TPC-1 or TPC-2 and it will have more circuits in TPC-3 than in TPC-1 or TPC-2. ITTWC stated, using a composite rate methodology, that this could result in the average cost per POR circuit being reduced, which could result in lower rates to the consumer. The State of Hawaii urged that no transpacific cable be authorized until it has been shown to be cost effective. This has not been done, Hawaii argued, since there has been no showing of revenue requirements or per circuit costs associated with the cable.

64. There are two basic questions that must be answered concerning the cost of the cable. First, what are the costs which ratepayers would be required to support? Second, are there significant cost savings to be gained or additional costs to be incurred by delaying the cable until 1991?

65. There is no question that the proposed transpacific cable is an expensive undertaking. TPC-3 will cost approximately $980 million in 1988 dollars, with AT&T's share being approximately $425 million. As indicated in footnote 33, this results in a theoretrical added overall revenue requirement for AT&T (return on investment plus taxes and expenses) of approximately $100 million for the first year the entire cable is in place. Of course, this figure would be partially offset by lower ownership expenses in the ANZCAN North cable, by reduced satellite lease expenses, and by transiting revenues paid by foreign administrations employing U.S. domestic facilities to carry traffic to and from TPC-3. AT&T estimates these costs and revenues to be about $101 million for the years 1988-1990, or $34 million per year (AT&T Reply Comments, at 12).[36] We cannot determine exactly what effect the added revenue requirement will have on rates, because, for a variety of reasons, an estimated increase revenue requirement may or may not be reflected in rates. If TPC-3 stimulates substantial demand for services beyond what it would

[36] There is some question about the extent of savings from discontinued satellite circuit usage. In addition to the savings on satellite circuits from 1988-1990 ($56 million), AT&T claims additional savings through 1995 of $181 million (Reply Comments, at 11-12). This calculation was not based on the loading methodology we adopt here; accordingly, we cannot credit it. Furthermore, if Comsat's revenue requirement is fixed, then, although the number of circuits that AT&T leases from Comsat may decline, the per circuit cost paid by AT&T for satellite circuits may increase, and the total satellite lease costs paid by AT&T to Comsat would remain relatively constant. There are too many unknown variables at this time, such as the cost of future satellite systems, the growth in demand for satellite circuits throughout the Pacific Basin, and INTELSAT pricing strategies, to predict accurately the net savings to AT&T in satellite lease expenses. *See* Footnote 14.

be otherwise, then rates need not increase. Also, AT&T might be unable or unwilling to earn a 12.75% return on this investment. Finally, because international costs and revenues are aggregated on a worldwide basis, circumstances in other regions affecting unrelated facilities may have a considerable impact. Thus, if we view the figures in the record as establishing a maximum, rather than an actual revenue impact, the building of TPC-3 may increase AT&T's revenue requirement by as much as $66 to $85 million per year in 1988 through 1990 ($100 million per year reduced by $34 to $15 million in savings).

66. The other question revolves around the cost savings or additional costs if the cable is delayed until 1991. AT&T, Comsat and others have argued vigorously as to the extent of any savings or additional costs due to delay. AT&T's total estimate of $365 million in increased costs due to delay appears overstated (see note 35, *supra*). However, at a minimum there will be savings of ANZCAN costs ($33 million) as well as an increase in transiting revenues ($12 million) if the cable is built in 1988 rather than 1991. Thus, total added costs (and lost revenues) if the cable is delayed until 1991, excluding satellite leases, may be $45 million or more.[37] On the other hand, it is possible that the cost of optical fiber cable may decline as manufacturers improve their pocesses and as demand for this procduct increases. Thus, the cost of physical cable may be lower if construction is delayed. From the foregoing analysis, we can conclude generally that some savings to ratepayers would result from a delay of the TPC-3 cable from 1988 to 1991. However, these savings are not likely to be so dramatic as to outweigh the advantages, recited here, of activating the cable in 1988.

F. Technological Risk

67. In the Further Notice we tentatively concluded that the introduction of TPC-3 in 1988 posed no technological risk to service. This was based upon our belief that there will be sufficient satellite capacity in the region throughout the planning period so that no communmications would be threatened if the cable were to perform below expectations. However, we also considered the possibility of potential benefits to be gained by

[37] As noted by Simplex, *supra* para. 63, there will be efficiencies produced if TPC-3 is manufactured immediately after TAT-8. If a delay occurs, then it is likely that manufacturing plants will have to be shut down in the interim, resulting in expenses when they are restarted. There is no evidence in the record indicating precisely the amount of such expenses.

delaying implementation of TPC-3 until 1991, including gaining experience with TAT-8 prior to introduction of fiber optic technology in the POR.

68. ITTWC argued that the technological risk of TPC-3 in 1988 is "de minimis." AT&T felt that there is no need to wait to gain experience from TAT-8 before proceeding to construct TPC-3. Rather, AT&T argued that the "knowledge and experience gained on other systems installed prior to TAT-8 will aid in minimizing technological risk." Further, according to AT&T, waiting to gain experience from TAT-8 would delay TPC-3 until about 1993. In its reply comments, Comsat took issue with this statement, stating that waiting for TAT-8 would delay TPC-3 until 1991.

69. We continue to believe that any technological risk stemming from a transpacific cable in 1988 is slight. While waiting to gain experience from TAT-8 certainly would not be harmful from a technological point of view, it is not necessary to delay the TPC-3 for technological reasons. Because a great deal of experience has been (or will shortly be) gained from other fiber optic cable projects, and because ample satellite capacity exists in the region, we find that there is no substantial justification to delay implementation of TPC-3 based upon technological risk.

G. Correspondent Acceptance

70. We tentatively found in the Further Notice that our foreign correspondents perferred Plan II-A (Mod. 4) with a ready-for-service date of 1988. We noted the long and extensive analysis of facilities needs by the USISCs and their foreign correspondents that led to the joint preference for Plan II-A (Mod. 4) in 1988.

71. Those commenters, including RCA and ITTWC, discussing international comity agreed with our tentative conclusion that Plan II-A (Mod. 4) is the plan most acceptable to our foreign correspondents. Our decisions, of course, are not decided solely by the needs and desires of our foreign correspondents. However, international comity remains an important factor in our decision making process. Thus, we conclude that from the standpoint of correspondent acceptance, Plan II-A (Mod. 4) is preferred.

H. National Security

72. Throughout this phase of the proceeding, DoD and NTIA have expressed their desire for a Guam landing point for defense, security and commercial reasons. The Further Notice reached no conclusion as to the advisability of including a Guam landing

point in the plans for any transpacific cable we might approve. We asked parties to comment on the advisability of a Guam landing and whether the added costs of a Guam landing would place an unnecessary and unjustified burden on ratepayers. Further, we asked for comments on whether the Commission should impose a special rate designed to recover the cost of a Guam landing.

73. No party filing comments was opposed to including a Guam landing for TPC-3. Most of the comments deferred to the expertise of DoD in national security matters. The fact that a Guam landing would give the U.S. a controlled point of entry into the POR and provide a transiting point for U.S. users were among the benefits cited by NTIA. In addition to national security, AT&T felt that a Guam landing is justified because it improves the quality and reliability of systems west of Guam, allows for digital interconnectivity to the Philippines and the South Pacific, and is commercially valuable to the U.S. cable industry. Comsat, however, questioned the need for another transmission path to Guam in 1988, given the low circuit usage to that point. It stated that two cable paths (TPC-1 and 2) and two satellite paths are sufficient until at least 1991. Hawaii also felt that a Guam landing could reasonably be delayed until 1991.

74. ITTWC, which supported a Guam landing, was the only party that supported a special charge to recover the costs of a Guam landing. ITTWC felt such a charge was justified given the small number of circuits DoD requires.[38] A number of parties, in arguing against a special charge, pointed to the widespread commercial benefits a Guam landing would provide. HTC argued that no special rate was needed because a Guam landing offers "sufficiently generalized benefits that they should be paid in a generalized way." Further, HTC stated that a special rate for Guam cable service would distort cable-satellite competition while a special rate for both cable and satellite service to Guam might cause bypass and lessen the chance of cost recovery. DoD stated that a "special" U.S. government contribution to the cost of a Guam landing would set a bad precedent for future projects. AT&T took no position on the issue of a special charge, except to note that tariff charges have never been made a condition of a cable authorization. A number of parties took issue with our estimate of the costs added by a Guam landing. NTIA put the

[38] DoD anticipates leasing less than 200 TPC-3 circuits by 1995 and only a few dozen by 1991.

cost of $16.5 million, while AT&T estimated the cost to be $20 million.

75. We find that a Guam landing is in the public interest. A major factor in this determination is the national security considerations discussed by DoD. However, there appear to be additional factors that support the inclusion of a Guam landing in TPC-3. These include service quality and reliability considerations, transiting and interconnection possibilities, and the advantages to U.S. carriers of having the midpoint of the cable further west.

76. We also conclude that a special rate for service to Guam is not justified. We are convinced that there are sufficient generalized service benefits to make a special rate unnecessary. These benefits include increased service reliability and quality, transiting and interconnection with future cable systems in the region, and a U.S. controlled landing point in the POR. Thus, we conclude that a Guam landing should be included in TPC-3 without a special rate.

I. U.S. Industrial Interests

77. Pursuant to the draft Construction and Maintenance Agreement, U.S. companies will construct the Haw-4 cable as well as the portion of TPC-3 from Hawaii to the branching unit. This represents a total of 5115 miles of 71.5% of the total cable length and 72.5% of the contract award ($430 million).[39] Japanese companies will construct the remaining 2034 miles from the branching unit to Guam and Japan. We reached no tentative conclusion in the Further Notice as to the effect delay would have on U.S. industrial interests. We did, however, state that the building of TPC-3 in 1988 "is of considerable value and importance to U.S. manufacturers." Nevertheless, we indicated that delay could have a greater negative effect on U.S. interests if the cable were being competitively bid (which it was not) rather than arising from a negotiated agreement between U.S. firms and their foreign correspondents (which it was).

78. Simplex, as the major U.S. manufacturer (with AT&T) of TPC-3, filed comments and replies that discussed the harm perceived if we delayed the cable until 1991. Simplex stated that the U.S. currently has a significant industrial advantage, and that

[39] AT&T has also been awarded the construction contract for the Guam-Philippines cable, valued at approximately $107 million. The remaining cables in the TPC-3 system have not yet been procured.

a two or three year delay could erode that lead because as the demand for coaxial submarine cables declines, countries such as England, France and Japan are turning to fiber optic technology. AT&T argued that a delay would harm U.S. industrial interests because it would require shutting down manufacturing facilities after TAT-8 is completed and then later restarting them. Comsat argued that there has been no showing made of any U.S. loss due to delay. Comsat reasoned that Haw-4 will be U.S. built whenever the cable is constructed, and that given the high planned U.S. usage of TPC-3, any negotiated agreement for the rest of the cable should be favorable to U.S. interests. Finally, Comsat felt it was doubtful that foreign know-how would catch up with that of the U.S. Hawaii, in its reply comments, asserted that U.S. interests would benefit by waiting until some experience with TAT-8 is gained.

79. There is no question that the current draft Construction and Maintenance Agreement is favorable to U.S. interests. It is difficult to gauge exactly what effect a delay would have on the way in which construction of the cable is apportioned. It seems safe to say, however, that U.S. industrial interests would not likely be in a more advantageous position if the cable is delayed. The question, then, is what are the chances that these interests will be in a worse position if the cable is built in 1991 instead of 1988. Given the speed with which other countries are developing the capacity to manufacture fiber optic cable, the prospect of U.S. interests building less of the cable if it is delayed appears to be real even if the project is not competitively bid. Thus, we conclude that U.S. industrial interests are best served if TPC-3 is deployed in 1988 rather than 1991.

J. Other Issues

80. *Further Bifurcation of the Process.* In the Further Notice we found that the plans and traffic forecasts submitted by the parties gave us sufficient information to enable us to recommend facility plans for the entire 1987-1995 time period. Thus, we tentatively conclude that there is no need to bifurcate the process further, and that the INTELSAT V, V-A and VI satellites as well as a fiber optic TPC-3 are the appropriate planned facilities for the POR of the 1987-1995 time period. Comsat stated that it felt that the issue of bifurcation should be held in abeyance until the timing of TPC-3 is settled. As no party has any strong objection to our tentative conclusion against bifurcation of the process, we

affirm that tentative conclusion.

81. *Master Loading Plan.* As we are adopting a regional loading methodology, it is not necessary for AT&T to file a Master Loading Plan on a country-by-country basis. However, we will require AT&T to file with its section 214 application to construct TPC-3, a regional loading plan, based upon its most recent traffic forecasts, for the 1987-1991 time period in conformance with the loading methodology we are adopting.

82. *Warranty Provisions.* In its comments, ITTWC asked the Commission to investigate the warranty provisions contained in the TPC-3 Construction and Maintenance Agreement. Specifically, ITTWC questioned why the warranty term for the negotiated TPC-3 is two years while the warranty term for the competitively bid TAT-8 is ten years. MCII and GTE Sprint, in their reply comments, echoed ITTWC's concerns.

83. The Commission is of course concerned with the quality and dependability of the proposed transpacific cable. However, we view the differing warranty terms, not as a reflection of inferior quality of TPC-3, but rather as an outcome of two different procurement processes. Additionally, there may be reasons such as greater distance, ocean depth, currents and water pressure to have a shorter warranty period for TPC-3 than TAT-8.

84. *State of Hawaii.* The State of Hawaii raised a number of issues relating to the use of TPC-3 as it relates to the states. Specifically, Hawaii urged the Commission to investigate allegedly discriminatory rates charged to Hawaiian ratepayers and asked that circuit allocations for services to Hawaii be made pursuant to a separate section 214 proceeding. Further, Hawaii argued that there has been no analysis of how the proposed TPC-3 would affect domestic rates or services. We do not find Hawaii's arguments to be germane to this proceeding. Specifically, Hawaii's charges relating to discriminatory pricing by GTE are more properly raised in a rate proceeding.[40] Further, as TPC-3 is intended to provide almost exclusively international services, we do not find it necessary to inquire into the effect that it will have on domestic services. Further, any carrier wishing to use TPC-3 for international services will be required to file a section 214 application which will be thoroughly considered whether in separate or combined actions.

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[40] Many of the issues Hawaii raises have been discussed at length in other proceedings. *See*, Integration of Rates and Servies, 61 FCC 2d 380 (1976), *recon.* 65 FCC 2d 324 (1977); Establishment of Domestic Communications—Satellite Facilities, 35 FCC 2d 844 (1972).

85. *Purchase of IRUs.* SBS asks that we insure that owners of the cable system make available IRU interests on the same terms as has previously been done in the Atlantic. In the Atlantic we ordered that "when a given applicant seeks to acquire or transfer an ownership or IRU interest in TAT-8 capacity, the reimbursement it receives shall be on the basis of depreciated original cost (or the prorated accumulated cost of such circuit if the system is not then operational) or in conformance with such policy as the Commission may develop in the future regarding the price at which IRU's will be made available." *See*, American Telephone & Telegraph Company, *et al.* (TAT-8 order), FCC 84-240, released June 8, 1984. We find no reason not to apply the same policy to transfers or sales of IRU interests in TPC-3. Further, capacity in TPC-3 should be made available to non-carriers in conformance with the policies developed in the Commission's proceeding in CC Docket *83-1230, International Communications Policies*, FCC 85-369, released August , 1985.

86. *AT&T's use of facilities.* ITTWC in its filings voiced its concern that AT&T not have an advantage over other carriers serving the non-IMTS market by placing this traffic entirely over new, low-cost facilities. While it is true that AT&T could achieve a pricing advantage over its competitors if it did place its less competitive IMTS traffic over older, higher cost facilities and its more competitive non-IMTS services over newer, lower cost facilities, AT&T likely will use a cross section of its available facilities for all of its service offerings. In any event this argument is highly speculative and does not dictate any action in this proceeding.

III. Summary and Final Conclusions

87. Traditionally, a number of significant factors are weighed in the facilities planning process. TPC-3 incorporates the most advanced technology and will become a vital link in worldwide communications. It also fosters greater intermodal and intramodal competition. TPC-3, particularly the carriers' preferred ring design cable, will also offer greater restoration flexibility as well as improved media and path diversity, is preferred by our carriers' foreign correspondents, satisfies the national security requirements of DoD, and raises no significant technological risks. We also cannot overlook the fact that the Construction and Maintenance Agreement, as it is currently drafted, is quite favorable to U.S. industrial interests. We cannot be assured of

such favorable treatment if the cable is delayed until 1991. Finally, a TPC-3 as early as 1988 insures that there will be sufficient capacity in the region to meet demand needs if, by choice or necessity, satellite deployment plans are altered.[41] Thus, we find, on balance, that such a cable with a ring design as proposed in Plan II-A (Mod. 4) and with a ready-for-service date as early as 1988 is in the public interest.[42]

IV. Ordering Clauses

88. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 4(j), 201-205, 214 and 403 of the Communications Act of 1934, as amended, 47 §§ 154(i), 154(j), 201-205, 214, 403 (1976) that we adopt the following policy guidelines for the Pacific Ocean Region:

(1) We find that a transpacific, fiber optic cable, Plan II-A (Mod. 4), with a ready for service date as early as 1988 is in the public interest.

(2) We find that the public interest would be served by the adoption of the phase-in loading methodology as set forth above.

89. IT IS FURTHER ORDERED that all U.S. TPC-3 co-owners shall file with their Section 214 application to build TPC-3 a regional loading plan, based upon their most recent traffic forecasts, for the 1987-1991 time period in conformance with the loading policies as set forth above. All U.S. TPC-3 co-owners shall also file country-by-country loading plans for the TPC-3 facility with their Section 214 application.[43] Additionally, all U.S. TPC-3 co-owners shall retain traffic loading data on a country-by-country basis for the 1987-1991 period.

90. Pursuant to Section 605(b) of the Regulatory Flexibility Act 5 U.S.C. §§ 605, IT IS ORDERED, that Sections 603 and 604 for the Act do not apply because the circuit distribution policies adopted herein is a rule of particular applicability to the American Telephone and Telegraph Company and is, hence, not subject to the Regulatory Flexibility Act.

91. IT IS FURTHER ORDERED that CC Docket 81-343

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[41] Even if there is a lack of an overall IMTS demand requirement for a TPC-3 in 1988, a balancing of the factors still leads us to conclude that a ready-for-service date as early as 1988 is in the public interest.

[42] While it is not our preferred plan, we also find that the public interest would be served if the U.S. carriers and their foreign correspondents choose to build Plan III Modified with a ready-for-service date as early as 1988.

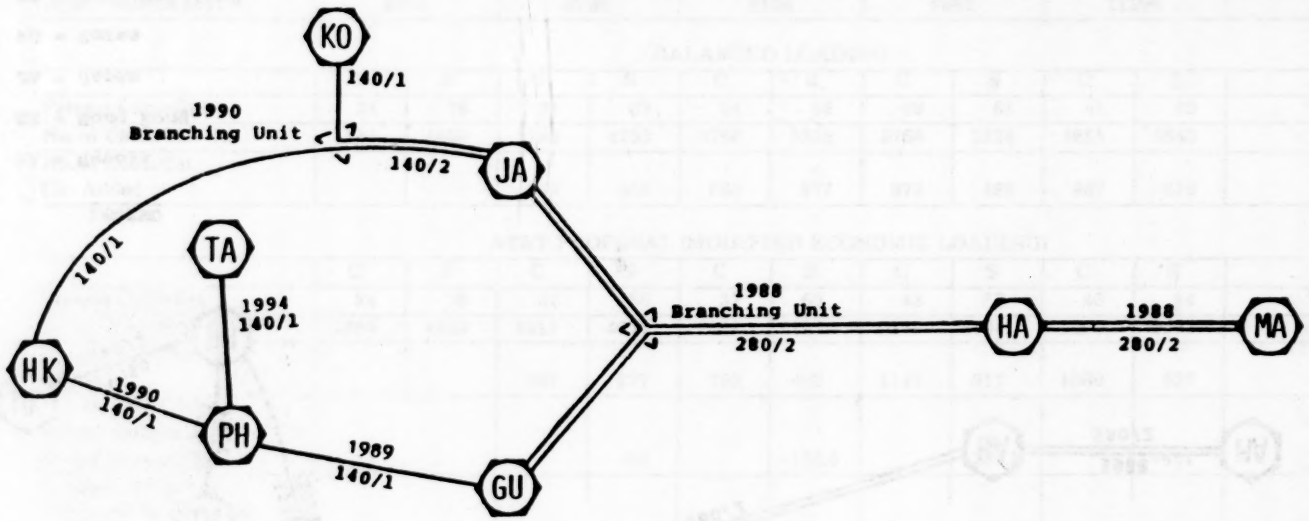
[43] This filing will permit a Section 214 authorization to both build the cable and activate the circuits therein consistent with the submitted plans. Activations not consistent with the submitted plans would require separate authorization.

remains open for additional proceedings upon further order of the Commision.

92. IT IS FURTHER ORDERED that the Secretary of the Commission shall cause this Second Report and Order to be published in the Federal Register and shall mail a copy of this decision to the Chief for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*



LEGEND

GU = Guam

HA = Hawaii

HK = Hong Kong

JA = Japan

KO = Korea

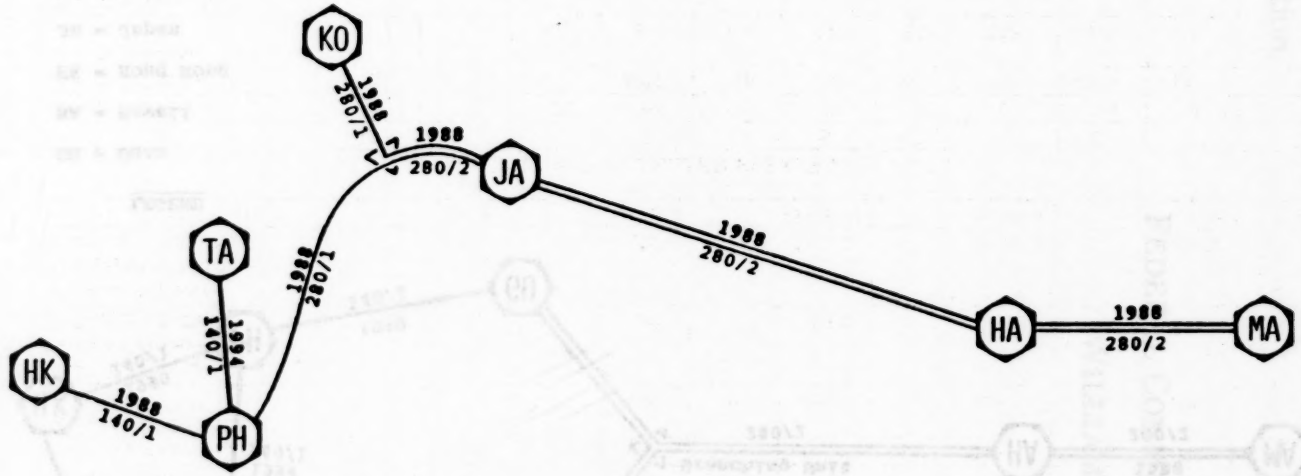
MA = U.S. Mainland

PH = Philippines

TA = Taiwan

PLAN II-A MOD (4)

APPENDIX 2



LEGEND

HA = Hawaii
HK = Hong Kong
JA = Japan
KO = Korea
MA = U.S. Mainland
PH = Philippines
TA = Taiwan

PLAN III MODIFIED

APPENDIX 3
COMPARISON OF THE APPLICATION OF CIRCUIT DISTRIBUTION GUIDELINES TO AT&T'S U.S.-PACIFIC MTS TRAFFIC

YEAR	1987		1988		1989		1990		1991		
AT&T FORECAST	5784		6888		8128		9592		11298		
BALANCED LOADING											
	C	S	C	S	C	S	C	S	C	S	
Percent Cable/Sat.	24	76	31	69	34	66	39	61	41	59	
No. of Cable/Sat. Cir.	1384	4400	2133	4755	2796	5332	3768	5824	4655	6643	
No. of Cable/Sat. Cir. Added			749	355	663	577	972	492	887	819	
AT&T PROPOSAL (MODIFIED ECONOMIC LOADING)											
	C	S	C	S	C	S	C	S	C	S	
Percent Cable/Sat.	24	76	32	68	37	63	43	57	46	54	
No. of Cable/Sat. Cir.	1384	4400	2211	4677	2991	5137	4138	5454	5207	6091	
No. of Cable/Sat. Cir. Added			827	277	780	460	1147	317	1069	637	
Sat. Cir. Year Difference Compared to Balanced Loading				-39		-136.5		-282.5		-461	TOTAL -919
Revenue Difference Compared to Balanced Loading COMSAT	-$	M		-$0.50M		-$1.74M		-$3.59M		-$5.86M	-$11.69M
INTELSAT	-$	M		-$0.40M		-$1.28M		-$2.64M		-$4.31M	-8.63M
4 PERCENT INCREASED FLEXIBILITY PER YEAR											
	C	S	C	S	C	S	C	S	C	S	
Percent Cable/Sat.	24	76	32	68	36	64	40	60	44	56	
No. of Cable/Sat. Cir.	1384	4400	2211	4677	2926	5202	3837	5755	4971	6327	
No. of Cable/Sat. Cir. Added			827	277	715	525	911	553	1134	572	
Sat. Cir. Year Difference Compared to Balanced Loading				-39		-104		-99.5		-192.5	TOTAL -435
Revenue Difference Compared to Balanced Loading COMSAT	-$	M		-$0.50M		-$1.32M		-$1.27M		-$2.45M	-$5.54M
INTELSAT	-$	M		-$0.40M		-$0.97M		-$0.93M		-$1.80M	-$4.1M

Advisory Committee
Domestic Fixed Satellite
Satellite Orbit

Order adopted establishing an Advisory Committee to aid in implementation of reduction of satellite spacing to 2 degrees. —*Reduced Orbital Spacing*

FCC 84-488

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Establishment of an Advisory Committee on Implementation of Reduced Orbit Spacing Between Domestic Fixed Satellites

ORDER

Adopted: October 17, 1984; Released: January 15, 1985

BY THE COMMISSION: COMMISSIONER QUELLO ABSENT

1. In *Reduced Orbital Spacing,*[1] the Commission found that new ways to maximize use of the oribital spectrum must be found if increasing demands for domestic fixed satellite service are to be met. The Commission adopted a policy to reduce the spacing between satellites to 2° over the next decade so that more satellites can be accommodated. Recognizing that compressed spacing increased the potential for interference between satellites, particularly for those operating in the 4/6 GHz band, the Commission tasked the Chief, Common Carrier Bureau, with soliciting informal suggestions as to whether an advisory committee composed of interested parties should be formed to make recommendations to the Commission and otherwise assist in

[1] *Licensing of Space Stations in the Domestic Fixed-Satellite Service,* (hereinafter *Reduced Orbital Spacing*), 54 Rad. Reg. 2d 577 (1983).

implementing the 2° spacing policy.[2]

2. Informal comments were requested from interested parties by *Public Notice*, Report No. DS-217 released October 19, 1983. The parties submitting comments[3] unanimously agreed that the formation of an advisory committee was desirable and each requested to be a member of the committee. Various suggestions were made for topics to be addressed.[4] In addition, areas previously identified by the Commission in *Reduced Orbital Spacing* were commented upon.[5] These matters are listed in Appendix B and all of them appear to warrant further study.

3. Based on the parties' comments, it appears that formation of an advisory committee is likely to be an effective and efficient means of obtaining expert technical and operational recommendations to better implement 2° spacings in the 4/6 GHz and 12/14 GHz bands. As stated in *Reduced Orbital Spacing*, the purpose of the committee is to evaluate various techniques that have been suggested so that potential interference conflicts occasioned by reduced orbital spacings between domestic fixed satellites are resolved. The advisory committee should address the advisability of implementating the approaches suggested in Appendix B, as well as any other approaches identified by the Committee. These matters should be evaluated with the purpose of preparing an initial report to the Commission to be submitted in mid-1985. This

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[2] *Id.* at paragraph 105-108. The Commission also stated that any such advisory committee will be precluded from addressing matters directly involved with international frequency coordination activities or preparations for international conferences, such as those for the 1985 Space WARC in General Docket No. 80-741 being addressed by our Space WARC Advisory Committee. In addition, matters subject to *ex parte* restrictions, such as the pending group of domestic satellite applications, are excluded from consideration by the Advisory Committee.

[3] American Satellite Company; The Associated Press; American Telephone and Telegraph Company; CBS, Inc.; Comsat General Corporation; Communications Satellite Corporation; Dalsat, Inc.; Equatorial Communication Services; Ford Aerospace Satellite Services Corporation; GTE Spaeenet Corporation; Hughes Aircraft Company; Hughes Communications Galaxy, Inc.; National Exchange, Inc.; Public Broadcasting Service; RCA American Communications, Inc.; Satellite Business Systems; Viacom International, Inc.; and Western Union Telegraph Company. These comments are summarized in Appendix A.

[4] Several of these suggested topics are being addressed in other proceedings. For example, the application of new antenna performance standards to existing international stations is being addressed by the Commission in its reconsideration today of *Reduced Orbital Spacing*, while the study of the need for surveillance to verify harmful interference and to devise methods to resolve interference issues will be addressed when the Commission considers the pending petition for rulemaking in RM-4206.

[5] *Reduced Orbital Spacing* at para. 105, and at Appendices B and C. Other suggestions provided in response to the *Public Notice* of October 19, 1983 have also been incorporated into Appendix B.

report should recommend any topics that require implementation by rulemaking proceedings together with substantive recommendations or options for such topics. Membership in the advisory committee will be open to any party affected by reduced satellite spacings.[6]

4. The advisory committee is intended to be an informal forum to discuss technical and operational problems resulting from 2° spacings and to present, if possible, a consensus recommendation to the Commission for any future actions it should take in the course of implementing 2° orbital spacing. The advisory committee is expected to operate flexibly and to consider any issue relevant to efficient and effective implementation of reduced orbital spacing. An informal arrangement for initial review of suggestions is preferable to a formal Commission rulemaking proceeding because the free discussion of the varying circumstances which may or may not cause interference between satellites is most likely to lead to solutions that will not impose substantial burdens on the Commission's resources. The work product of the Committee should consist of reports representing a technical consensus accepted by industry representation reflecting good engineering practice, and/or recommendations to the Commission on matters requiring its attention.

5. In particular, there appear to be three general areas where the advisory committee can provide expert advice and recommendations. These areas concern earth station and space station antenna measurement and verification techniques, and coordination procedures, and interference reduction techniques. In the *Order* on reconsideration of *Reduced Orbital Spacing* adapted today, we have indicated several specific areas for advisory committee consideration. These include investigation and recommendation of spacecraft standards, development of test and verification procedures to determine compliance with our antenna sidelobe standards, development of standards relating to a showing of 2° spacing compatibility, and standards by which to judge a non-conforming antenna's lack of interference potential. Because of the breadth of potential options and approaches to these matters, the informal forum of an advisory committee should provide an efficient means of initially exploring the possibilities. Moreover, a general consensus should be possible on the available

[6] Any interested party involved in the use of domestic fixed satellite services may become a member of the advisory committee by attending meetings and participating in the work of the committee. In order to operate efficiently, small informal working groups may be established to consider particular issues.

options with each being specifically defined. Even where consensus is not achieved, a written report to the Commission will help focus any further future proceedings.

6. To date, it has not been necessary for the Commission to specify technical standards for satellite operations. Such standards were not necessary at 4° orbital spacings because most services could be provided without unacceptable interference.[7] However, at 2° spacings, some outer limits may be required to provide solutions to interference problems. In other cases, certain modulation characteristics may be required to reduce either the interference potential of a transmission or the interference susceptibility of another transmission. Review of such matters may allow the identification of certain minimum steps each operator will be expected to take to resolve interference problems.

7. Identification of any such minimum standards is unlikely to resolve all potential difficulties because realistic standards would have to be flexible enough to allow operation of the wide variety of equipment and services which currently characterizes the domestic satellite industry. Thus, as recognized by both the Commission and the parties, some form of coordination may be desirable. None of the currently recognized coordination procedures[8] appears efficient. And advisory committee will be a useful means of identifying interference interactions for which coordination between domestic satellite operators could be desirable. The committee might also provide suggestions for the procedures to be followed in such a coordination mechanism.

8. Finally, we have recognized that achieving 2° spacings in practice requires that certain satellite and earth station parameters meet specific requirements. *Reduced Orbital Spacing* and the rules adopted as a result of that order may not be sufficiently precise to permit accurate verification of compliance with the revised standards of Section 25.209 of the rules. An advisory committee could effectively supplement these policies and rules with more detailed specification together with standard test and verification methods to be submitted for Commission adoption.

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[7] We do, of course, review the impact of new small antenna operations on adjacent satellite interference. *See e.g., American Broadcasting Companies*, 62 FCC 2d 901 (1977); *Equatorial Communication Services*, Mimeo 2831, released March 13, 1984. Conditions may also be imposed on such operations to assure that unacceptable interference would not result to others. *Id. See also, American Satellite Corporation*, 72 FCC 2d 750 (1979); *Public Broadcasting Service*, 70 FCC 2d 1853 (1979).

[8] *See e.g.* Sections 21.100(d) and 25.203-25.255 of the Commission's rules, 47 C.F.R. §§ 21.100(d) and 25.203-25.255, and Articles 11, 13 and 14 of the international Radio Regulations (Geneva, 1982).

9. After its initial report is furnished to the Commission, the committee should consider and make recommendations regarding the desirability of additional activity to further implement the transition to uniform 2° spacings. Such discussions should contribute to the resolution of any unforeseen problems resulting from reduced satellite spacings and to the expedition of the introduction of new technologies. Regular reports during the transition period would provide a useful means of Commission oversight of this process without necessitating a formal regulatory mechanism. This process appears attractive because its initial operation is in an informal atmosphere and all affected parties have the opportunity to participate in the group meetings. Effective use of such an advisory committee mechanism could result in efficient resolution of future interference problems with minimum regulatory intrusion by the Commission.

10. Accordingly, IT IS ORDERED that an Advisory Committee be established to assist the Commission in the satisfactory operation of domestic satellites at 2° orbital spacings. The staff IS INSTRUCTED to take the necessary steps to obtain the prompt approval of the charter of the Advisory Committee, attached as Appendix C.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix A

COMMENTS RECEIVED IN RESPONSE TO PUBLIC NOTICE, REPORT NO. DS-217 RELEASED OCTOBER 19, 1983

American Satellite Company — ASC states that 2° spacing will generate substantial interference problems. It is particularly concerned about the problems of intersatellite interference and interference suffered by carriers caused by the erroneous actions of other system operators. ASC recommends an agenda to review existing rules, terrestrial coordination procedures, principles of coordination and voluntary as opposed to mandated procedures.

The Associated Press — AP believes that the committee could provide a forum for the development of preliminary responses to problems which may arise as a result of 2° spacing, the establishment of performance standards for small antennas and for the exchange of ideas for the coordination of intersatellite interference.

American Telephone and Telegraph Company — AT&T states that to the fullest extent possible the technical and operational aspects of telecommunications should be freed from regulatory involvement so that opportunities for implementing new technology and for providing innovative services are maximized. However, AT&T believes that some minimum Commission requirements for participation in

interference coordination techniques, recommendation of rules for next generation satellites and identification of factors affecting earth stations are essential to aid in the long-term planning proces.

CBS, Inc. — CBS states that it has a significant interest in the permissible minimum size of antennas for uplinking television signals at 6 GHz for occasional use and is also concerned with the present maximum permissible EIRP to adjacent satellites.

Comsat General Corporation — ComGen will be pleased to nominate a member to the advisory committee.

Communications Satellite Corporation — Comsat states that it remains in favor of a numerical power density standard and suggests topics such as antenna verification tests, procedures to address problems, performance standards for newly constructed INTELSAT earth stations, and the relationship of antenna standards on CCITT and CCIR recommendations to be addressed by an advisory committee.

Dalsat, Inc. — Dalsat suggests as issues interference as a function of spacecraft G/T and translation gain for FM SCPC traffic, position of sidelobe nulls for small antennas, adjacent satellite energy density, enforcement and qualifications, and effects on the transportable earth station industry.

Equatorial Communication Services — Equatorial states that it is eager to participate in a full discussion of the power denisty standards that it proposed in its comments in CC Docket No. 81-704.

Ford Aerospace Satellite Services Corporation — FASSC suggests that an advisory committee establish a standard analytical model for performing interference analyses, consider adoption of an inter-satellite coordination process to coordinate polarization and transmission modes between adjacent satellites, and establish a detailed schedule ultimately leading to uniform 2° spacing.

GTE Spacenet Corporation — GTE states that an adivsory committee could recommend specific information required for coordination or resolution of conflicts by the Commission and could address uniquely technical questions. It urges the Commission to given substantial weight to its recommendations in promulgating any regulations.

Hughes Aircraft Company — Hughes supports the Commission's objectives of an advisory committee and suggests that the duration of such a committee's existence be extended so as to provide a continuous forum on interference matters with participation by industry and the Commission.

Hughes Communications Galaxy, Inc. — HCG suggests that the committee's efforts could serve as a basis for Commission guidelines in delineating future spacing assignments, antenna polarization schemes, modulation plans, and permanent establishment of a committee to provide a continuing forum on satellite spacing matters.

National Exchange, Inc. — NEX believes that an advisory committee will assist in obtaining reduced satellite spacings and will encourage futher technical innovations in the satellite industry.

Public Broadcasting Service — PBS suggests as functions of an advisory committee the exchange of information between users of satellite technology and

assistance in accomplishment of transition to 2° spacing with maximum use of existing facilities and services and with minimal delay and costs.

RCA American Communications, Inc. — RCA Americom suggests that an advisoy committee should address protection ratios for all traffic, the advantage of frequency offset between signals, transmission parameters for existing and future kinds of traffic, and the quantification of earth station antenna performance characteristics.

Satellite Business Systems — SBS states that the primary purpose of the advisory committee should be to suggest guidelines which the Commission can promulgate for the satellite community, to serve as a mechanism for satellite operators to resolve interference issues, to clearly differentiate between 12/14 GHz and 4/6 GHz satellites spacing issues, to devise a notification plan for satellite operators regarding interference characteristics which will effect the performance of other satellites, and to create a dispute resolution mechanism.

Viacom International, Inc. — Viacom states because of its position as a user of satellites for television program distribution and of receive-only earth stations it requests representation on the advisory committee.

Western Union Telegraph Company — Western Union states that it is an interested party and will shortly forward a list of technical topics to be considered.

Appendix B

POSSIBLE TASKS FOR ADVISORY COMMITTEE

I. EARTH STATION FACILITIES
- —Antenna test procedures
- —Antenna field verification procedures
- —Precise technical specifications
- —On-going surveillance techniques
- —Feasibility of earth station antenna sidelobe levels lower than 29–25 Log 0

II. SPACE STATION FACILITIES
- —Antenna test procedures
- —Precise technical specifications
- —On-going surveillance techniques

III. COORDINATION PROCEDURES AND INTERFERANCE REDUCTION TECHNIQUES
- —Common interference model
- —Common data base
- —Increased amount of interference from adjacent satellites in total noise budget
- —Use of power density criteria to facilitate inter-satellite coordination
- —Grouping of similar services by frequency
- —Use of actual antenna patterns in place of standard performance envelope
- —Additional techniques to reduce interference such as:
  - a. Reduced average talker level on FDM carriers
  - b. New emphasis characteristics for FDM and FM/TV carriers
  - c. Improved methods of synchronizing television signals

Appendix C

ADVISORY COMMITTEE FOR THE IMPLEMENTATION OF REDUCED ORBITAL SPACINGS BETWEEN UNITED STATES DOMESTIC FIXED-SATELLITES

A. *Official Designation of the Advisory Committee*
The Advisory Committee for the Implementation of Reduced Orbital Spacings Between United States Domestic Fixed-Satellites. The short-form reference for the Committee will be the Reduced Spacing Advisory Committee.

B. *Names of the Subcommittees*
None at the present.

C. *Committee's Objectives and Scope of Activity*
(1) Objective: To provide recommendations to the Federal Communications Commission on efficient means of implementing 2° orbital spacings between domestic fixed-satellites in the 4/6 GHz and 12/14 GHz bands.
(2) Scope of Activity:

I. *Phase I*: Prepare a report to the Commission describing initial experience with reduced orbital spacings, and identify those technical and/or operational matters requiring immediate Commission action to reduce any anticipated interference problems resulting from 2° orbital spacings. Particular emphasis should be placed on developing recommendations for any necessary spacecraft antenna gain and polarization standards, verification procedures for space station and earth station antenna standards, and any necessary coordination procedures between satellites.

II. *Phase II*: Prepare a report to the Commission describing any future activities that might be necessary to effectively address the impact of new technologies and new satellites and earth station designs on satellite spacing in the future. The objective of any such recommendations is to measure the impact of new facilities and services at an early stage so that they can be introduced under conditions of reduced satellite spacings with a minimum of regulatory delay and interference to other satellite systems.

D. *Period of Time Necessary for the Committee to Carry Out Its Purpose*
Final written reports for the initial work product must be completed by July 1, 1985 and recommendations for any further activities by January 1, 1986.

E. *Official to Whom the Committee Reports*
Chief, Common Carrier Bureau, Federal Communications Commission

F. *Agency Responsible for Providing Necessary Support*
The FCC will furnish administrative support, including the facilities needed for conducting Committee meetings, to the extent necessary.

G. *Description of the Duties for which the Committee is Responsible*
The duties of the Committee will be to assemble data and to prepare analyses and recommendations concerning the matters set out in Part C above and to furnish them to the FCC.

H. *Estimated Operating Costs in Dollars and Staff-Years*
The estimated annual operating costs are $26,000 for the FCC. Estimated

staff-years are .5 for the FCC and 15 for private and other government participants.

I. *Estimated Number and Frequency of Committee Meetings*
The full Committee will meet at least 4 times a year.

J. *Charter Submitted*

K. *Committee's Termination Date*
Evaluation of the need to continue the Committee — July 1, 1986.

Satellite Communications, Authorized Carrier, Domestic Satellite Domestic Communications

Changes in ownership structure of Satellite Business Systems (SBS) approved. Aetna Life and Casualty Company and International Business Machines Corp., two of the three equal partners in SBS, authorized to purchase third partner's (Communications Satellite Corp.) interest in SBS.
—*Satellite Business Systems*

FCC 84-589

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Application for Approval of Certain Changes in the Ownership Structure of Satellite Business Systems	File No. ENF-4-6

MEMORANDUM OPINION AND ORDER

Adopted November 28, 1984; Released November 28, 1984

BY THE COMMISSION:

1. Before the Commission is an application filed by Satellite Business Systems (SBS) on August 1, 1984, pursuant to Titles II and III of the Communications Act of 1934, as amended, seeking Commission approval of certain changes in the ownership structure of SBS.[1] Currently SBS is a partnership of International Business Machines Corp. (IBM), Communications Satellite Corporation (COMSAT), and Aetna Life and Casualty Company (Aetna), each owning a one-third interest. The application seeks approval for IBM and Aetna to purchase all of COMSAT's partnership interest in SBS, with IBM acquiring 80 percent of COMSAT's shares and Aetna purchasing the remaining 20 percent. This would result in IBM holding a 60 percent interest in SBS and

[1] A public notice on this application was released on August 6, 1984. No comments were filed in response thereto.

Aetna holding a 40 percent, with Aetna having an option until January 31, 1986, to equalize its ownership interest. Until then, control and funding would be divided equally between Aetna and IBM. After exercise of the option or the expiration of the option period, IBM and Aetna would fund and hold voting interests in SBS commensurate with their partnership interests. For the reasons discussed below, we grant the application.

BACKGROUND

2. *Background.* The history of Commission action regarding the ownership structure of SBS is central to our determination here. In the early 1970's COMSAT, MCI Communications, Inc. (MCI) and Lockheed Aircraft Corporation (Lockheed) formed the CML Satellite Corporation (CML) for the purpose of offering domestic satellite services. Before the system became operative, MCI and Lockhead indicated they were no longer willing to contribute to the financing of CML. Consequently, in 1974, CML, COMSAT and IBM petitioned the Commission for approval of changes in CML's corporate structure whereby COMSAT would acquire a 45 percent and IBM a 55 percent ownership share of CML. While the Commission determined that both IBM and COMSAT were qualified to provide domestic satellite services, it rejected their application to offer these services. *CML*, 51 FCC 2d 14 (1975). The Commission, as well as the numerous opposing parties, was concerned about the potential impact of the combined entry of IBM and COMSAT in the then-emerging domestic satellite industry. *Id.* at 27. Although the Commission favored IBM's and Comsat's participation in the new domestic satellite field, our underlying policy was to develop an industry structure that would promote effective competition. Therefore, we offered the applicants three alternatives for entry: 1) The Independent Entry Option — IBM could enter independently and COMSAT could enter independently; 2) The Balanced CML Option — IBM and COMSAT could participate as partners with one or more additional partners, provided that no partner had less than a 10 percent interest or more than a 49 percent interest or was otherwise in a position to exercise *de facto* control; and 3) The Lease Option — COMSAT could provide space segment service to IBM as a carrier's carrier with IBM providing common carrier services to the public. *Id.* at 38-39. IBM and COMSAT chose the "balanced CML" option whereby they were required to find a third partner for the venture to "balance" IBM's and COSMAT's

influence. *Id.* at 41. Aetna agreed to participate in the satellite venture, to be called Satellite Business Systems, with COMSAT and IBM. Subsequently, upon the filing of a new application conforming with the *CML* decision, the Commission approved SBS' entry into the domestic satellite service subject to certain conditions. *SBS*, 62 FCC 2d 997, 1020, *recon. den.*, 64 FCC 2d 872 (1977), *aff'd sub nom. United States v. FCC*, 652 F.2d 72 (1980).

3. *The Proposal.* As set forth in paragraph 1, above, SBS now requests authority to reorganize its ownership structure so that IBM and Aetna can purchase all of COMSAT's partnership interests in SBS. SBS explains that it has already invested over $750 million of its partners' capital in various satellite communications undertakings and plans to increase its Skyline service offering from the current 28 originating cities to 50 by year-end 1984 and 200 by 1988 and to expand similarly its private network offerings. This growth will require substantial additional capital, and while IBM and Aetna wish to continue making the necessary capital contributions, COMSAT does not. In the past, the three partners have contributed equally to SBS' fundings and have had an equal vote in the management of SBS. Until the Commission considers the proposal, IBM and Aetna have agreed to continue to contribute funding equally, but COMSAT was released from making additional capital contributions to SBS on July 31, 1984.[2]

4. SBS further explains that the proposed changes in ownership are not intended to alter the plans, operations, or policies of SBS. It states that the legal and financial qualifications of both IBM and Aetna have previously been reviewed and approved by the Commission in 1977, *SBS*, at 1043-46, and they continue to stand behind the organization. It is further represented that the technical capability of SBS to operate will not be affected by the change in ownership. There have been no challenges to the proposal or to the legal, financial or technical qualifications of SBS, IBM or Aetna.

DISCUSSION

5. After studying the pleadings, the underlying documents and agreements, and the confidential materials made available by the parties, we find that the proposed restructuring of SBS is

[2] Should the Commission disapprove the proposed changes, COMSAT may elect to equalize its funding contributions and maintain it's one-third interest or have its ownership interest and voting position diluted. Should its hare in SBS decline, the company would still conform with the terms of the Commission's 1977 order.

consistent with our earlier *CML* and *SBS* orders. A concern of the Commission in 1975 was that the proposal, under which IBM would have a controlling interest in the partnership, might unreasonably restrain or inhibit the potentially significant contribution COMSAT could make with its unique satellite expertise. *CML*, at 37. As noted, we indicated a willingness to authorize IBM and COMSAT to enter the field independently or jointly with an additional partner. Moreover, we approved Aetna's entry as a partner who could contribute to SBS' success. *SBS*, at 1043-44. Recently, we determined that given changed market circumstances SBS lacks the potential to restrict market entry in the data communications field. *Satellite Business Systems* FCC 84-197 at paragraph 23, released June 8, 1984, 98 FCC 2d 762. While we did not make a specific finding on whether IBM possesses sufficient market power to impair competition as it exists in the telecommunications market, we did determine that allowing SBS more freedom in marketing practices would benefit the public "without harm to the public in the form of anticompetitive conduct by IBM and/or SBS." *Id.* at paras. 23 and 27. In light of these considerations, we foresee no untoward threat to competition by permitting IBM to continue in the communications industry as either the controlling partner or as an equal partner with Aetna in SBS. Indeed, grant of the requested modification to SBS' operating authority will serve the public interest by assuring continued adequate financing of SBS and thereby helping to stimulate competition in the marketplace. Therefore, we will grant SBS' application for approval of changes in it's partnership structure as outlined above.

6. Accordingly, pursuant to Sections 4(i), 214(c) and 303(r) of the Communications Act of 1934, as amended, and Sections 102(c) and (d) of the Communications Satellite Act of 1962, as amended, IT IS ORDERED, That the Application for Approval of Certain Changes in the Ownership Structure of Satellite Business Systems IS GRANTED, subject to the prior conditions imposed on SBS' grant of authority under Titles II and III of the Act.[3]

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

[3] SBS should file the appropriate forms to consummate the transfer.

AMENDMENTS

1. *Corporate Name and Address.* The name of the Corporation applying for the low power television license and the address of the Corporation has been changed as a result of the consolidation of the various National Innovative Programming Network, Inc. companies.

2. *Officers, Directors and Shareholders.* As part of the above noted consolidation, there have been changes in the ownership and direction of the Applicant as noted in the attached Form 346.

3. *Engineering and Technical Information.* Appended are the results of the review undertaken by Applicant to meet the standards established by the Commission to govern the low power television service.

4. *Equal Employment Opportunity.* Applicant appends and certifies to the program and criteria to be employed in accordance with the principles to which Applicant as a minority owned and controlled entity is totally committed in all employment decisions and opportunities.

5. *Fairness Doctrine and Political Broadcasting.* Applicant hereby pledges to comply with the Fairness Doctrine and all political broadcasting rules which the Commission may establish from time to time to the extent feasible within the operating context contemplated by the Applicant and described within the pending Applications.

CATV Carriage, Foreign Language Stations
Constitutional Issue
Review Applications For

Application for review denied. Local Spanish-language station entitled to carriage.
—*Service Electric Cable TV*

FCC 84-450

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re:	
Service Electric Cable TV of New Jersey, Inc.	CSR-43
Application for Review	

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 1984; Released: October 4, 1984

BY THE COMMISSION:

1. On May 7, 1984, Service Electric Cable TV of New Jersey, Inc. (hereinafter "Service Electric"), operator of a cable television system serving Sparta, New Jersey, and neighboring communities, filed an application for review of the action taken by the Chief of the Video Services Division, Mass Media Bureau, pursuant to delegated authority, in *Service Electric Cable TV of New Jersey, Inc.*, Cable Television Actions Report No. 2874, Mimeo No. 3622 (released April 16, 1984). Service Electric's application is opposed by Spanish International Communications Corporation (hereinafter "WXTV"), licensee of Station WXTV (Ind., Channel 41), Patterson, New Jersey.[1]

[1] Service Electric also filed a reply pleading on June 6, 1984. This pleading, however, was not requested by the Commission, and is in excess of the page limitations for properly filed replies in any event, and will not be considered, pursuant to Section 1.115(f) of the Commission's Rules.

2. Service Electric sought a waiver of its obligation to carry WXTV in January 1984. Service Electric claimed that it is essentially a 12-channel system, and that mandating carriage of WXTV's programming, which would be of interest only to area Hispanics, would constitute "outrageous treatment" of the remainder of the population. The Division Chief rejected these arguments, particularly the latter as being "constitutionally inappropriate," and noted that local stations were entitled to access to the audiences which they are licensed to serve, and that Service Electric conceded its capacity to accommodate WXTV by offering to carry the station on the system's mid-band tier. *Service Electric Cable TV of New Jersey, Inc., supra.*

3. In support of its application for review, Service Electric claims that the Division Chief erred in finding that the public interest favorerd WXTV's carriage. Service Electric contends that only about one percent of its subscribers are Hispanic, and that carriage of WXTV will deny to the majority of the system's subscribers "the benefits of an English speaking channel . . ." and infringe upon their rights. Service Electric denies that this is an ethnically-based argument, as characterized by the Division Chief, and notes that Service Electric's Allentown, Pennsylvania system carriers WXTV to a subscribership of which 3.19 percent are of Spanish origin. Service Electric suggests that carriage of a given station should not be required unless 2 percent of the potential audience are presumed to understand the language in which the station broadcasts, and states that newspapers are not subject to requirements similar to the mandatory carriage rules. Service Electric criticzes WXTV's carriage request as unduly late, because the station has been operational since 1968, and argues that the system should not have to provide free converters for WXTV's reception if the station is placed on the mid-band.[2] Grant of the requested waiver, alleges Service Electric, would be consistent with the Commission's recent decision in the *Memorandum Opinion and Order in RM-3786*, 55 RR 2d 1365 (1984) ("Turner petition"),[3] because Service Electric has demonstrated the adverse impact the mandatory signal carriage rules have in this particular situation.

4. In its opposition, filed May 22, 1984, WXTV argues that the

[2] Service Electric commenced carriage of WXTV on the system's basic tier on May 4, 1984, placing a discretionary broadcast signal on the system's mid-band.

[3] By this decision, the Commission declined to institute a rulemaking proceeding to eliminate the mandatory signal carriage rules.

Division Chief was correct in finding that Service Electric did not make the requisite compelling showing to warrant waiver. WXTV notes that Service Electric's Sparta system has greater than 12-channel capacity, and that Service Electric's neighboring Hampton Township and Lafayette Township systems carry the station. WXTV contends that Commission precedent recognizes the value and favors the carriage of non-English programming on cable systems, citing both the *Cable Television Report and Order*, 36 FCC 2d 143, 180–181 (1972) and the *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 335 (1972). Allegations of lack of popularity do not justify waiver of the signal carriage rules, WXTV argues, nor can it be assumed that only area Hispanics desire to watch the station or understand it programming. WXTV characterizes Service Electric's population benchmark proposal as "ethnically based on its face, and therefore constitutionally suspect," (footnote ommited), citing *Fullilove v. Klutznick*, 448 U.S. 448, 472, 480 (1980), and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979), and that it would be more appropriate, in any event, as a rulemaking proposal. Finally, WXTV disputes Service Electric's analysis of the Turner petition, stating that therein the Commission noted several arguments favoring retention of the signal carriage rules.

5. We find that the Division Chief did not err in denying Service Electric's waiver request. We have consistently found that "carriage of stations broadcasting predominantly in a foreign language [is] in the public interest," *Memorandum Opinon and Order in Docket No. 20553*, 60 FCC 2d 661, 666 (1976). *See also Notice of Proposed Rulemaking in Docket No. 20553*, 54 FCC 2d 424, 425–426 (1975); *Reconsideration of the Cable Television Report and Order*; 36 FCC 2d at 335; *Cable Television Report and Order*, 36 FCC 2d at 180–181. Contrary to Service Electric's contentions, WXTV is a local station to petitioner's subscribers, is licensed by this Commission to serve them, and may request carriage at anytime, regardless of its type of programming. Service Electric has proffered nothing more than bald speculation that WXTV's programming is of interest only to the Hispanic population. Finally, Service Electric misreads our action in *RM-3786, supra*, as WXTV points out. Petitioner therein did not submit compelling evidence to warrant commencement of the inquiry requested, and Service Electric has submitted even less

compelling contentions in favor of its proposed policy change today.[4]

6. In view of the foregoing, we find that grant of Service Electric's application in not in the public interest.

7. Accordingly, IT IS ORDERED, That the application for review filed May 7, 1984, by Service Electric Cable TV of New Jersey, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

[4] It is settled, further, that carriage of WXTV on a mid-band tier would require Service Electric to give free converters to its subscribers. *Monterey Peninsula TV Cable* (Salinas, California), 56 RR 2d 159 (1984), *recon. denied*, _____FCC, 2d _____ (1984), *appeal docketed sub nom. Sainte Broadcasting Corp. v. FCC*, No. 84-1209 (D.C. Cir. May 31, 1984)

Comparative Case, New Criteria
Obscenity
Reivew Board, Certification
Subscription TV, Renewal of License, Standards for

Review Board remanded comparative renewal proceeding involving incumbent subscription television (STV) station on issue to determine whether it transmitted obscene material in violation of 18 U.S.C. Sec. 1464. It also certified to Commission the question of whether licensee's past performance should be judged by same renewal expectancy standards as conventional b/c stations.
—*Video 44*
MM Docket No. 83-575

FCC 85R-74

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Harrisburg of Chicago, Inc., *et al.* a Joint Venture, d/b/a VIDEO 44	MM Docket No. 83-575 File No. BRCT-820802J9
For Renewal of License of Station WSNS-TV, Channel 44, Chicago, Illinois	
and	
Monroe Communications Corporation Chicago, Illinois	MM Docket No. 83-76 File No. BPCT-21101KH
For a Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: August 29, 1985; Released: September 5, 1985

BY THE REVIEW BOARD: BOARD MEMBER BLUMENTHAL JOINING WITH SEPARATE STATEMENT.

1. This is the eighth comparative renewal case which the Review Board has considered since the expansion of its jurisdiction.* Based on its review of the full briefs and exceptions filed by the parties, and some two and one half hours of oral arguments on August 23, 1985, the Board has unanimously concluded that two outstanding matters prevent a final resolution of the proceeding at this time. The first, a factual issue which we will remand for further hearing, is whether Video 44 in its subscription telecasting transmitted obscene material in violation of 18 U.S.C. § 1464. The second, a legal question of first impression upon which concurrent Commission guidance will be sought, is whether the legal standards which are to be utilized in judging the past performance of an incumbent subscription television licensee are the same as for a conventional television station.

2. By Initial Decision, FCC 85D-11, released February 21, 1985, the presiding Administrative Law Judge denied the television renewal application of Video 44 and granted the competing application of Monroe Communications Corporation to establish a new television station at Chicago, Illinois. The ALJ had concluded that Video 44, which throughout its license term was evolving from a conventional station to a subscription television (STV) station, had ceased near the end of that term to transmit public service programming such as news, public affairs, and other non-enterainment programming; he therefore awarded Video 44 no renewal expectancy. I.D., paras. 78-80, 88-89. Monroe was held to

* The other cases are: (1) *George E. Cameron Jr. Communications*, 91 FCC 2d 870, 52 RR 2d 455 (Rev. Bd. 1982), *recon. denied*, 93 FCC 2d 789, 53 RR 2d 917; (2) *Broadcast Communications, Inc.*, 93 FCC 2d 1162, 53 RR 2d 805 (Rev. Bd. 1983), *modified*, 97 FCC 2d 61, 55 RR 2d 997 (Comm'n 1984), *aff'd per curiam sub nom. Genesis Broadcasting Ltd.* v. *FCC*, No. 84-1154 (D.C. Cir. March 29, 1985); (3) *United Broadcasting Company, Inc.*, 94 FCC 2d 938 (Rev. Bd. 1983), *modified*, FCC 84-639, released January 14, 1985; (4) *Intercontinental Radio, Inc.*, 98 FCC 2d 608, 56 RR 2d 903 (Rev. Bd. 1984), *modified*, 57 RR 2d 1616 (Comm'n 1985); (5) *Kaye-Smith Enterprises*, 98 FCC 2d 675, 56 RR 2d 252 (Rev. Bd. 1984), *recon. denied*, 98 FCC 2d 670, *review denied*, FCC 85-192, released April 19, 1985; (6) *Pillar of Fire*, 99 FCC 1256, 57 RR 2d 601 (Rev. Bd. 1984); and (7) *Baker Protective Services, Inc.*, 97 FCC 2d 570, 55 RR 2d 1584 (Rev. Bd. 1984), *recon. denied*, FCC 84R-56, released August 9, 1984 (public mobile radio service comparative renewal proceeding).

be the superior applicant based on its preferences for diversification of mass media control and ownership participation in management. *Id.*, para. 92.

3. In its brief, Video 44 challenges the ALJ's denial of a renewal expectancy for its allegedly substantial and meritorious performance, after conceding that without such an expectancy, it would finish behind Monroe under the standard comparative criteria. Video 44 Exceptions, at 1. Among its key supporting arguments, Video 44 claims that its "STV operation demonstrates substantial service in the public interest". *Id.*, at 41. It cites as meritorious programming its carriage of "current and classic feature movies . . . in their original theatrical version . . .; special musical productions, broadcast both live . . . and taped. . .; stage plays and teleplays . . .; family and children's programs . . .; and sports programming." *Id.*, at 42-43. Also, it "offered, in response to consumer demand, a late night service featuring 'adult' movies, offered for a separate and additional subscription fee." *Id.*, at 43. Monroe, however, responded that Video 44's entertainment programming included the broadcast of matter which is "indecent" as defined in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and included the telecast of such adult programming during a substantial portion of the station's hours of operation. Monroe Brief in Support of Initial Decision (hereinafter "Monroe Br."), at 12-23.

4. Video 44 urges that the narrow holding in *Pacifica, supra*, should not be extended to the present factual situation because the programs complained about were available to only those members of the public who sought and paid for its STV service, which includes a decoder to unscramble the program signal. Thus, children would be in the audience only if their parents elected to purchase and bring Video 44's movies into the home and failed to exclude their children from the audience; nor would the material be thrust upon unconsenting adults. The Board agrees that the differences between STV service and conventional broadcast operations distinguish the present case from *Pacifica. See Oak Broadcasting Systems, Inc.*, Mimeo No. 2308, released February 5, 1985, at para. 7, where the Chief, Mass Media Bureau in a related case reached the same conclusion. *Cf. David Hildebrand*, 92 FCC 2d 1245 (Rev. Bd. 1983) (*Pacifica* does not permit revocation of amateur radio license for use of indecent language); 47 U.S.C. §223(b)(2) (restricted access is a defense to "dial-a-porn" prosecution).

5. Nevertheless, the Board's own independent review of Monroe's allegations concerning Video 44's adult programming (reproduced in the Appendix below) indicates that substantial and material questions of fact have been raised as to whether Video 44 has telecast material that is obscene as defined by the Supreme Court in *Miller* v. *California*, 413 U.S. 15, 24 (1973):

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defind by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

In *Illinois Citizens Committee for Broadcasting* v. *FCC*, 515 F.2d 397 (D.C. Cir. 1975), both the Commission and the Court applied the *Miller* standard to 18 U.S.C. §1464 which provides that "[w]hoever utters any obscene . . . language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." Both the Commission and the Supreme Court have recognized that "Congress has specifically empowered the FCC to (1) revoke a station's license (2) issue a cease and desist order, or (3) impose a monetary forfeiture for a violation of Section 1464. . . . The FCC can also (4) deny license renewal or (5) grant a short term renewal, 47 U.S.C. §§307, 308." *FCC* v. *Pacifica*, 438 U.S. at 730 note 1. In essence, a unanimous Board has concluded that Monroe has made a *prima facie* showing which meets the *Miller* and *Illinois Citizens* standards. In fact, Monroe's showing appears to present a more pronounced violation than the radio broadcast found objectionable by the Commission and the Court in *Illinois Citizens, supra*, 515 F.2d at 401 n.4. At issue here is the effect of the broadcast of the particular adult programming, if determined at hearing to be obscene, upon the licensee's basic and comparative qualifications, as a part of the Commission's organic public interest standard. *See* 47 U.S.C. §307(a), (c).

6. Unlike *Oak Broadcasting Systems, Inc., supra*, where the Mass Media Bureau did not order a renewal hearing on an obscenity issue against a California station that has some common ownership with the instant station, because the obscenity issue was concurrently before the appropriate U.S. District Court, the allegations before us have not been presented to any local forum in Illinois. In remanding this case for further proceedings on an obscenity issue, we note that Monroe acknowledged at oral

argument that it never raised that issue as such at the hearing. The ALJ may therefore utilize the prehearing, discovery, and summary judgment procedures to refine the factual issues to be tried. And if a trial-type hearing must ultimately be held the ALJ should first ascertain what procedures must be utilized to insure that the record contains the type of evidence which provides the "functional equivalent of a jury determination of a clear community consensus [as to whether] the material is lewd and offensive." *Illinois Citizens, supra*, 515 F.2d at 407 (Supp. Opinion).

7. Finally, the need for remand is not obviated by the I.D.'s denial of Video 44's renewal application. At this point, the ultimate resolution of this proceeding is far from certain. The parties vigorously disagree over what renewal standard should apply to STV stations. Video 44 claims that the public interest value of its STV operation must be assessed in determining whether to grant it a renewal expectancy. Video 44 Exceptions at 33. It requested that the ALJ specify an issue to compare the relative need for an STV station versus a ninth conventional commercial television station in Chicago, introduced evidence of how it selected and scheduled STV programming in order to respond to consumer demands, and claimed that its STV operation fulfilled Commission STV objectives. *Id.* In support of its position that STV operation is unique and serves the public interest through its direct responsiveness to marketplace foreces, Video 44 cites the history of STV and the Commission's evolutionary deregulation of that form of television operation and its increased reliance on marketplace forces as a means of securing service in the public interest. *See id.*, at 34-41.

8. The ALJ below, and Monroe and the Bureau here, cite limited and identical history as supporting their contrary view that STV stations must be evaluated by the same renewal standards as conventional stations., *See* I.D., paras. 81-87; Monroe Reply at 16-21. By these standards, "an incumbent licensee has a statutorily-derived 'renewal expectancy' if it has rendered 'substantial service,' " *Pillar of Fire*, 99 FCC 2d 1256, 1258, 57 RR 2d 601, 604 (Rev. Bd. 1984). Substantial service is measured by such factors as licensee ascertainment of community needs and problems, licensee programming responsive to those ascertained needs and problems, including a quantitative and qualitative evaluation of its non-entertainment programming, and the extent of public support or complaints and Commission rule violations. *See id.*, at 1259-1276; 57 RR 2d at 605-619. Having ourselves reviewed the history of STV, we find little guidance on

renewal standards issue for incumbent STV licensees is needed. And, this question will be certified to the Commission pursuant to Section 0.363(a) of the Commission's Rules, 47 CFR 0.363(a). *See RKO General, Inc. (WRKO)*, FCC 85R-18, released February 21, 1985 (limited question certified to Commission).

9. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED to the presiding Administrative Law Judge for adduction of evidence on the following issue and the issuance of a Supplemental Initial Decision.

> To determine whether Video 44, during the 1979-1982 license term, transmitted obscene material which violated 18 U.S.C. § 1464 and, if so, the effect thereof on its basic or comparative qualifications.

10. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence on the above issue SHALL BE on Monroe Communications Corporation and that the burden of proof SHALL BE on Video 44.

11. IT IS FURTHER ORDERED, That the question as to whether the past performance of an incumbent subscription television licensee should be judged by the same renewal expectancy standards as conventional broadcast stations IS CERTIFIED to the Commission for its consideration pursuant to Section 0.363(a) of the Rules, 47 CFR 0.363(a).

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

Appendix

(reprinted from Monroe Br. at 20-22)

Monroe introduced in evidence the following description of one of the movies telecast in the adult program segment during the license term entitled "Pandora's Mirror" (Monroe Ex. 8):

> Virtually the entire film is devoted to sexual acts and related activities including nudity throughout the film.
>
> The initial episode, following a brief opening of the movie that includes use of the word "cunt" three times, is a shower scene approximately three minutes in length containing female nudity, self-stimulation and masturbation with "flashes" of pictures of male-female manipulation.
>
> With a brief segue, there is a series of scenes approximately ten minutes in length depicting female nudity, self-stimulation and a variety of sexual acts and manipulation performed by three males on one female. These scenes depict forced sex, including a lengthy treatment of male intercourse of the female while held, restrained and manipulated by two other males,

presented in an attractive light without any depiction of adverse consequences to the victim.

With a brief segue (as the movie progresses, the segues become briefer), there is another series of scenes approximately 16 minutes in length depicting anal manipulation, oral sex by a female on two males, anal sex by a male with a female and lengthy treatment of a male having sex with a female while the female is having oral sex with another male.

The movie continues in this vein: an episode approximately eight minutes in length that depicts oral and other sexual acts between a male and female including lengthy treatment of anal manipulation and anal sex of the female by the male with some force and brutality; a series of episodes approximately 18 minutes in length involving female self-stimulation with a dildo, male-female sexual acts and female-female sexual acts; a series of episodes approximately 12 minutes in length depicting an orgy scene involving male-female and female-female sexual stimulation and sexual acts, including oral sex by a female with another female in chains, involving approximately six males and approximately four females; the concluding scenes depict a lengthy treatment of a female engaging in oral sex and sexual intercourse with two males simultaneously.

During the course of this film, the following words are used; cunt, fuck shit, cock, suck that cock, tits and lick that pussy.

During the April 1981 to October 1982 nineteen-month period approximately 130 movies telecast by WSNS-TV are described in the record as [set] forth in the program folios issued by Video 44. Monroe Ex. 6. These titles and descriptions corroborate that "Pandora's Mirror" is typical of the program fare during the adult segment. Video 44 witnesses testified that other movies in the adult program segment were devoted to treatment of sexual themes and contained similar language. Tr. 859-60, 680-81. Four illustrations that reinforce this point:

Kinky Ladies of Bourbon Street November 13, 28, 1981

Unlike most adult movies, French-made *Kinky Ladies of Bourbon Street* has a strange psychological bent. Four attractive young women (Dawn Cummings, Helga Trixi, Penelope Lamour and Veronique Monod), all fed up with life, gather to put an end to their lives in one huge orgy of pleasure. The chosen place is fitted with all of the paraphernalia to such an end, and one by one they succumb and die. As one critic put it, "For those who crave the lavish and unusual in kinky entertainment, *Kinky Ladies* is the best bet." 1 hr., 25 min. (A[dults] O[nly], *Dubbed, Nudity, Violence, Adult Themes*)

The Erotic Adventures
of Zorro January 8, 19, 23, 29, 1982

A sex comedy about the "Z" rated, swashbuckling Zorro who ravishes the country with his long, quick rapier and leaves his mark on any who dare surrender to him. 1 hr., 30 min. (A[dults] O[nly], *Sexual Scenes*)

7 Into Snowy August 6, 19, 31, 1982

Based on the children's story, *Snow White and the Seven Dwarfs*, this erotic remake dispenses with the poison apple and gives you a series of carnal

adventures instead. (1979, 1 hr., 19 min.) (*Nudity, mature subject matter)*

Easy October 2, 10, 18, 26, 1982

Jessie St. James is back in the title role of *Easy*. Once she was Kate Harrison, a quiet high school teacher. Then she is seduced by an offensive lineman on the school team and then by the entire offensive lineup! (1979, 1 hr., 21 min). (*Nudity, mature subject matter*).

Monroe Ex. 6 pp. 11, 14, 33, 36.

SEPARATE STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL

At a recent meeting of the Attorney General's Commission On Pornography, the following view was voiced:

> The sexual exploitation of any human being, especially those who are young, impressionable or in a vulnerable position, is reprehensible. It is an affront to every individual and to every community that strikes to maintain a decent society to protect its citizens and their fundamental rights. Let me repeat. We do ourselves and society a disservice if we attempt to deal with the problem as if it victimizes only one specific sex or class of people.
>
> * * *
>
> Researchers have found that poronography helps create and maintain inequality between the sexes and thus differentially harms women in a number of ways. The sexually explicit subordination of women, graphically depicts and often presents women who apparently enjoy pain or mutilation or women as sex objects who are tied up, cut up, bruised or physically hurt, is one of the male-oriented poronographic industry.
>
> * * *
>
> Pornography is a vice that destroys values and contributes to the breakdown of the family. We have become a society filled with lonely divorced and separated individuals who have been deprived of the joys of family life. Last year, over half a million children were born out of wedlock and many of those children will never experience the stabilizing and strengthening effect of family life.

Testimony of Senator Dennis DeConcini, June 20, 1985, Tr. at 227–229. Whether or not one is in accord with that sociological proposition, the *law* is clear on at least one facet of the interminable debate over pornography: *obscene utterances are not protected speech under the First Amendment.*

In a 1974 FCC case involving "topless" radio programming that can only be considered mild cheese compared to the material allegations summarized in the Appendix to our order, *ante*, the late Judge Harold Leventhal (certainly no pecksniff) opined for the court:

> The excerpts cited by the Commission contain repeated and explicit descriptions of the techniques of oral sex. And these are presented, not for educational and scientific purposes, but in a context that was fairly described by the FCC as 'titillating and pandering.' . . . The principles of *Ginzburg v. United States*, 383 U.S. 463 (1966), are applicable, for commercial exploitation of interests in titillation is the broadcaster's sole end.

Illinois Citizens Committee For Broadcasting v. FCC, 515 F.2d 397, 404 (D.C. Cir. 1974).

Voicing similar sentiments in the case setting forth our operative obscenity standard, Chief Justice Burger dismissed the critique that the Supreme Court majority's action might lead to the supression of valuable speech. The Chief Justice stated:

> The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a 'misuse of the great guarantees of free speech and free press . . . .' *Breard v. Alexandria*, 341 U.S., at 645, 71 S.Ct., at 934. The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. 'The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people.' *Roth v. United States, supra*, 354 U.S., at 484, 77 S.Ct., at 1308 (emphasis added). *See Kois v. Wisconsin*, 408 U.S., at 230-232, 92 S.Ct., at 2246-2247; *Thornhill v. Alabama*, 310 U.S., at 101-102, 60 S.Ct., at 743-744. But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.
>
> There is no evidence, empirical or historical, that the stern 19th century American censorship of public distribution and display of material relating to sex, *See Roth v. United States, supra*, 354 U.S., at 482-485, 77 S.Ct., at 1307-1309, in any way limited or affected expression of serious literary, artistic, political, or scientific ideas. On the contrary, it is beyond any question that the era following Thomas Jefferson to Theodore Roosevelt was an 'extraordinarily vigorous period,' not just in economics and politics, but in *belles lettres* and in 'the outlying fields of social and political philosophies.' We do not see the harsh hand of censorship of ideas — good or bad, sound or unsound — and 'repression' of political liberty lurking in every state regulation of commercial exploitation of human interest in sex.

Miller v. California, 413 U.S. 15, 34-36 (1973).

The recurrent debate over pornography is frequently perceived to run with political polarities, the liberals defending and the

conservatives attacking.[1] But the alignment here is a bit more indistinct for — at their extremities — political ideologies of "the left" and "the right" occasionally evince naive fascination with the purer nostrums of libertarianism. The extremes both seem drawn to chimera of "absolute" individual freedom, much the way the Homeric minions lurched toward Circe.

Still, as regards pronography, the vital center of our body politic — and its regnant jurists — have held the line, and have clearly indicated that they simply do not want to inhabit a society whose sexual mores are ordered by the precepts of Caligula. (Or even Larry Flynt).

In remanding this case to determine whether the licensee has violated 18 U.S.C. §1464, the Board has most definitely not ruled, at this point, that the transmissions at issue are legally obscene; merely that significant and material questions of fact have been raised, and therefore must be examined. 47 U.S.C. §309(e). Should the instant transmissions be determined not to be obscene within the meaning of *Miller*, we shall say so clearly.[2]

But, for several years, the Commission has been engaged in a dedicated campaign to expand the First Amendment rights of broadcasters so as to foster a greater freedom of debate on public policy issues. *See, e.g., General Fairness Doctrine Obligations of Broadcasting Licensees* (Gen. Docket No. 84-282), FCC 85-459, released August 23, 1985. That campaign, I fear, might be greatly discredited if it appeared that the agency's growing latitude encouraged a trafficking not in legitimate ideas, but in a spectrum pollution that would befoul the nation's social environment just as surely as a toxic waste dump would upset the ecobalance of a children's playground.

The potential violations of federal law here being broadcast-related, recent and repeated, our charge is to order the taking of

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[1] Ironically, it is now certain feminists who most stridently decry pornography, claiming that such material discriminates against women. *See generally American Booksellers Ass'n. v. Hudnut*, No. 84-3147 (7th Cir. filed August 27, 1985) (striking Indianapolis, Indiana ordinance equating pornography with civil rights denial).

[2] At the same time, however, some might doubt the wisdom of retaining the license in the hands on an entity whose "movie editor" is depicted as follows:

> When asked to explain the term kinky sex, the only subject matter that Mr. Strand would exclude on this ground was sex involving animals. Tr. 1143-44. He would not rule out, for example, a homosexual activity known as fist fucking. Tr. 1143.
>
> Monroe Br. at 22-23 (*citing* hearing transcript).

evidence. *Violations by Applicants of Laws of the United States*, 42 FCC 2d 399 (1951).[3]

In that connection, we recognize that we are here dealing with subscription television and that "each medium of expression presents special First Amendment problems." *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) *citing Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). However, if interstate commerce in obscene material is actionable under 18 U.S.C. §1461 (cognate postal obscenity statute) even if consummated by sealed mail at the hands of consenting adults, *cf. Hamling v. U.S.*, 418 U.S. 87 (1974), the subscription aspect would appear to be wholly irrelevant under 18 U.S.C. §1464.

[3] The policy espoused therein holds that the agency may independently investigate potential violations of law where another forum having jurisdiction over the offense has not acted. *See*, 42 FCC 2d at 403. Had our Media Bureau heeded the injunction of the court in *Berlin Communications, Inc. v. FCC*, 626 F.2d 869, 873 (D.C. Cir. 1979), and referred the material adduced by the license challenger to the Department of Justice, this agency might have been spared the task of civil enforcement of the criminal code provision on obscene broadcasts. *But compare Gilmore Broadcasting Corp.*, 95 FCC 2d 289, 290 (Rev. Bd. 1983) (Commission designates antitrust issue for hearing despite ongoing federal grand jury investigation of licensee for identical activities). Yet the Bureau — our "public interest" *watchman* — either myopically found nothing amiss or chose to ignore the material as well as *Illinois Citizens Committee, supra*. "Watchman, what of the night?" (*Isaiah* 21:11)

FCC 85D-11

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Harriscope of Chicago, Inc., et al a Joint Venture, d/b/a VIDEO 44	MM Docket No. 83-575 File No. BRCT-80802J9
For Renewal of License of Station WSNS-TV, Channel 44, Chicago, Illinois	
and	
Monroe Communications Corporation Chicago, Illinois	MM Docket No. 83-576 File No. BPCT-821101KH
For a Construction Permit	

Appearances

Stanley B. Cohen, Brian M. Madden and *J. Brian DeBoice*, on behalf of Harriscope of Chicago, Inc., et al a Joint Venutre, d/b/a Video 44; *Gene A. Bechtel* and *Harry Cole*, on behalf of Monroe Communications Corporation; and *Norman Goldstein*, on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: February 14, 1985; Released: February 21, 1985

Preliminary Statement

1. This proceeding involves the application of Harriscope of Chicago, Inc., Essaness Theatres Corporation and National Subscription Television of Chicago, Inc., a Joint Venture d/b/a Video

44 (Video 44) for renewal of the license of Station WSNS-TV, Chicago, Illinois, and the mutually exclusive application of Monroe Communications Corporation (Monroe) for a new television station to operate on the channel presently occupied by WSNS-TV.

2. In the Hearing Designation Order, 48 Fed. Reg. 30442, published July 1, 1983, the Chief, Mass Media Bureau, acting under delegated authority, designated the competing applications for hearing on the following issues:

1. To determine with respect to Monroe whether common ownership, operation or control of a cable television system would be consistent with Section 76.501(a)(2) of the Commission's Rules, and if not, whether circumstances exist that would warrant a waiver of the rule.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest, convenience and necessity.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

The *Hearing Designation Order* also provided that in the event of a grant of the Monroe application, the construction permit shall be conditioned as follows:

> In the event that the CID Broadcasting, Inc. application (BP-810105AE) for a new AM station in Chicago is granted, prior to the commencement of operation of that radio station, Arthur R. Velasquez shall certify to the Commission that he has divested himself of all interest in, and connection with, Monroe Communications Corporation; and
>
> Operation with maximum effective radiated power in excess of 1000 kilowatts shall not commence absent Canadian consent.

3. Prehearing conferences was held on September 1, and October 5, 1983. Admissions sessions were held on December 1 and 2, 1983 in Washington, D.C. Hearing sessions were held on December 6, 7, and 8, 1983 in Chicago, Illinois. A post hearing conference was held on December 23, 1983 in Washington, D.C. and there were two further hearing sessions on February 28 and 29, 1984 in Washington, D.C. The Mass Media Bureau's participation was limited to the waiver issue and to determining whether Video 44 is entitled to a "renewal expectancy." The record was closed by *Order*, FCC 84M-1797, released April 12, 1984. Proposed Findings of Fact and Conclusions of Law were filed by the parties

on May 4, 1984 and Video 44 and Monroe filed Replies on May 22, 1984.

Findings of Fact

Waiver Issue — Monroe

4. Wayne N. Fickinger is vice-president, a member of the Board of Directors and Executive Committee and a 10 percent voting shareholder in Monroe. Fickinger has a passive, non-voting, limited partnership interest amounting to a fraction of 1 percent (approximately 15/100ths of 1 percent) in two cable television ventures: (i) Chicago Cablevision Investments, which holds cable franchises or operates cable systems currently serving approximately 50,000 subscribers in the following communities in the State of Illinois, many of which are located in the Chicago area: Bedford Park, Bridgeview, Burbank, Burnham, Country Club Hills, Darien, Dixmoore, Downers Grove, East Hazel Crest, Forest View, Hodgkins, Homewood, Justice, Lyons, McCook, Merrionette Park, North Riverside, Oak Park, Palos Heights, River Forest, Stone Park, Summit, Willow Springs, Cicero, Evanston, Niles, Sauk Village, and Woodridge; and (ii) Cablevision Programming Investments, which has interests in national cable programming services (Bravo and the Playboy Channel) and certain regional cable program services, none of which serve the Chicago area. As a limited partner, Mr. Fickinger does not have any power to direct the policies or operation of these ventures. Mr. Fickinger is one of a large number of limited partners (in excess of 50 in each of the ventures), and the small fractional nature of the interest also precludes Mr. Fickinger from influencing the policies or operation of these ventures. These investments are attended to by Mrs. Fickinger. Mr. Fickinger will divest himself of these cable-related interests in the event that Monroe's application for a construction permit is granted (Monroe Ex. 1, pp. 8–9)

Comparative Issue

Video 44

5. Video 44 is an Illinois joint venture. The three joint venturers and their respective ownership interests in Video 44 are as follows (Video 44 Ex. 17, p. 1):

Harriscope of Chicago, Inc. (Harriscope of Chicago)	50%
Essaness Theatres Corporation (Essaness)	25.5%
National Subscription Televison of Chicago, Inc. (NSTC), a wholly-owned subsidiary of Oak Industries, Inc. (Oak)	24.5% [1]

6. Harriscope of Chicago is an Illinois corporation. As of May 25, 1983, 600,000 shares of voting common stock were issued and outstanding. The officers and directors of Harriscope of Chicago are as follows (Video 44 Ex. 17, p. 4):

Name	*Office*	*Director*
Burt I. Harris	President	Yes
Irving B. Harris	—	Yes
Jack Rosenthal	Vice President	Yes
Richard Plotkin	Vice President	No
Ruth Bender	Secretary	No
William Guerra	Vice President	Yes
John P. Gwin	Vice President	Yes

The shareholders of Harriscope of Chicago as of May 25, 1983 are (Video 44 Ex. 117, pp. 4-5):

Irving B. Harris, as Trustee	306,000 shares	51%
NSTC (Oak)	294,000 shares	49%

The beneficial owners of the shares voted by Irving Harris as Trustee are as follows (Video 44 Ex. 17, p. 5; Video 44 Ex. 19, p. 1):

Owners	*Total Shares*	*Percentage of Stock*
Irving B. Harris	249,670	41.6%
Burt I. Harris	15,300	2.6%
Greg Nathanson	12,750	2.1%

[1] Oak has a 49% ownership interest in Harriscope of Chicago. Therefore, Oak's beneficial interest in Video 44 is 49% (Tr. 764).

Owners	*Total Shares*	*Percentage of Stock*
Roxanne H. Meyer Frank	7,258	1.2%
William W. Harris	7,258	1.2%
Virginia H. Polsky	7,258	1.2%
Jack Rosenthal	3,417	.6%
Yale Roe	3,089	.5%

7. Principals of Harriscope of Chicago have the following media interests (Video 44 Ex. 17, Attachment A):

Name of Principal	*Media Interest*
Burt I. Harris	President, Director, 10.5% shareholder Harriscope Broadcasting Corporation which has the following media interests: Licensee of Stations KULR-TV, Billings, MT; KBAK-TV, Bakersfield, CA; KTWO(AM), KTWO-TV, Casper, WY; Licensee or permittee of TV Translator Stations located in: Lewiston, MT; Miles City, MT; Forsyth, MT; Bozeman, MT; Laramie, WY; Sheriday, WY; Lovell/Greybull, WY; Lander/Riverton, Ft. Washakie, WY; Bondurant, WY; Jackson, WY; Applicant for satellite TV station, Channel 7, Sheriday, WY (File No. BPCT-830506LW), and other television translator stations serving areas of Wyoming; Owner of stock (60%) of Catawba Valley Communications, Inc., owner/operator of cable system, Hickory, NC; Owner of common stock (43.5%) of Cable Television Company of Greater San Juan, Inc., owner/operator of cable television sys-

	tem and MDS system in Puerto Rico;
	Joint venturer (33 1/3%) in Fresno MDS, licensee of common carrier MDS in Fresno, CA;
	Holder of Management Agreement with Harriscope of Los Angeles, Inc., licensee of KWHY-TV, Los Angeles, CA.
	President, Director, 4% shareholder of Catawba Valley Communications, Inc.;
	President, Director of Cable Co. Television of Greater San Juan, Inc.;
	Sole owner, President and Director of Harris Cable Corp., 14.1% owner and manager of Cable Television of Greater San Juan;
	President, Director, 29.69% owner, voter of 59.38% stock of Harriscope of Los Angeles, Inc.
	Director, 2% owner, voter of 32% of stock of New Mexico Broadcasting Co., Inc., license of KGGT-MV, Albuquerque, NM, and sole owner of Western Sun Broadcasting Co., applicant for a new TV station, Channel 8, Roswell, NM (File No. BPCT-830830KI);
	Director, 5% owner of Hayward Corporation, which owns 25% of Oak Systems of Chicago, joint venture formed to operate the WSNS-TV subscription service;
Irving B. Harris	47.5% owner (individually), 13.4% (as trustee), Director of Harriscope Broadcasting Corp.
	6.6% owner of Cable Television Co. of Greater San Juan;
	29.69% owner and Director of Harriscope of Los Angeles;
	10.5% owner of New Mexico Broadcasting Co.;

	Director, President, 16.8% owner, 65% Trustee of Hayward Corporation;
	Trustee of Chicago Educational Television Association which has the following media interests: licensee of noncommercial television station WTTW, Chicago, IL; 100% owner of WFMT, Inc., licensee of WFMT-FM, Chicago, and interim operator of WFMT(AM), Cicero, IL; and, publisher of magazine, "Chicago Guide".
Jack Rosenthal	3.9% owner, Director, Executive Vice President of Harriscope Broadcasting Corp.
	2.1% owner, director of Cable Television Co. of Greater San Juan.
	Less than 1% owner of New Mexico Broadcasting Co.
	1.1% owner of Hayward Corp.
	Director of Harriscope of Los Angeles, Inc.
Ruth Bender	Less than 1% owner and Assistant Secretary of Harriscope Broadcasting Corp.;
	Secretary of Harris Cable Co.;
	Secretary, less than 1% owner of Cable Television Co. of Greater San Juan;
	Assistant Secretary of Catawba Valley Communications, Inc.
Roxanne H. Meyer Frank	10.5% beneficial owner, of Harriscope Broadcasting Corp.
Virginia H. Polsky	13.4% beneficial owner of Harriscope Broadcasting Corp.
Greg Nathanson	4.1% owner of Hayward Corp.
	Indirect interests in cable television systems located in California: 3.8% owner, Vice President, Treasurer, Director of Advance Corporation, which is a 40% general partner in Falcon Cable TV of Northern California and

	a 40% limited partner of Falcon Communications.
Yale Roe	1% owner of Hayward Corp.
John P. Gwin	Executive Vice President of Oak Industries, officer and/or director of Oak subsidiaries.
	Vice Chairman, President, Director of NSTC.
William Guerra	Vice President, Director of NSTC.

8. Essaness, a Delaware corporation, as of July 15, 1982 has 3,750 authorized shares of voting common stock, of which 2,500 are outstanding, and 1,200 are held as treasury shares (Video 44 Ex. 17, p. 5).

9. The officers, directors and stockholders of Essaness as of July 15, 1982 are (Video 44 Ex. 17, p.5):

Name	*Office*	*Shares*
Jack Silverman	Chairman, Director	247 2/3
Alan F. Silverman	President, Director	80
Susan Silverman	Vice President, Director	80 [2]
Edward Rocska	Senior Vice President, Secretary, Director	None

10. The balance of the outstanding shares of stock is held in various trusts for the benefit of Jack Silverman, Alan T. Silverman and Susan Silverman, with the result that each of the Silvermans holds a 33 1/3% beneficial interest in Essaness. See Video 44 Ex. 17, Attachment B, pp. 12–13.

11. Essaness owns and operates movie theaters (approximately 86 screens) in Illinois, Wisconsin and Indiana. Essaness has 49 movie screens operating in the Chicago metropolitan area. It is the second largest exhibitor of first-run movies in the Chicago metropolitan area where there are approximately 200 first-run movie screens. (The largest exhibitor operates 58 first-run screens; the third largest operates 41 first-run screens.) The principals of Essaness own Essaness Pictures Corporation which has produced or been associated in the production of seven movies, including "Coal Miner's Daughter." (Video 44 Ex. 34).

[2] An Ownership Report filed February 21, 1984 on behalf of Essaness reported that a distribution of shares of Essaness stock, formerly held in trust, has been made to Alan Silverman, increasing to 247 2/3, the number of shares held by Alan Silverman, individually.

12. Essaness also has a 25% ownership interest in Oak Systems of Chicago, the joint venture formed to operate the subscription television service offered by WSNS-TV (Video 44 Ex. 17, p. 5).

13. NSTC, a Delaware corporation is wholly owned by Oak Systems, Inc., a subsidiary of Oak Communications, Inc., a subsidiary of Oak Industries, Inc., a publicly-held Delaware corporation (Video 44 Ex. 17, p. 6).

14. As of February 1, 1983, the officers and directors of NSTC, Inc. were (Video 44 Ex. 17, p. 6):[3]

Name	*Office*	*Director*
Everett A. Carter	Chairman	Yes
John P. Gwin	Vice Chairman, President	Yes
William Guerra	Vice President	Yes
David E. Gordon	Vice President	No
Ronald S. Comm	Treasurer	No
E. Jeanne Hamm	Secretary	No

15. There are 23 officers and directors of Oak Industries, Inc., including Messrs. Carter and Gwin, and Ms. Hamm, virtually all of whom live outside the State of Illinois. No individual owns as much as 1% of the stock of Oak Industries, Inc. (Video 44 Ex. 17, Attachments C and D).

16. Oak, through its various subsidaries, has the following other media interests (Video 44 Ex. 17, Attachment E):

> 100% owner of licensee of WKID-TV, Channel 51, Fort Lauderdale, Florida and 100% owner of the STV franchise holder.
>
> 50% owner of Oak Systems of Chicago, Inc., franchise holder for WSNS-TV subscription television service.
>
> 100% owner of licensee, KSBC-TV, Channel 52, Corona, California. The subscription franchise holder is owned by two wholly-owned subsidiaries of Oak Communications, Inc.: Oak Television, Inc. (51%); NST Holding Co., Inc. (49%).
>
> 100% owner of licensee of TV translator station K57CD, Rancho Bernardo, Poway and Escondido, California, which rebroadcasts Station KBSC-TV.

[3] A letter signed by counsel for Video 44 accompanying an Ownership Report, filed April 5, 1984 on behalf of NSTC, indicates that, with the exception of William Guerra and E. Jeanne Hamm, the above-named directors and officers of NSTC have resigned. In addition, Everett Carter has been replaced as a Director of NSTC by Frank A. Astrologes, effective June 10, 1983, and Mr. Astrologes continues to hold that position.

Applicant for new TV station on Channel 20 in Denver, Colorado (BPCT-790319LC) with interests in proposed STV franchise holder.

Joint venturer with Telstar Corporation which will market satellite-delivered programming to pay television outlets. Oak will market programming to STV services, low power television systems and CATV systems. Telstar will market programming to hotels, motels, resorts and similar outlets.

17. Pursuant to an Agreement among the Video 44 joint venturers, dated May 16, 1980, the business and operation of Video 44 and WSNS-TV have been controlled by a seven-number Management Board, composed of representatives from each of the joint venturers. The members of the Board and the parties they represent are as follows (Video 44 Ex. 17, pp. 1-2):

Burt I. Harris	Harriscope of Chicago
Irving B. Harris	Harriscope of Chicago
Jack Rosenthal	Harriscope of Chicago
Alan Silverman	Essaness
Ronald S. Comm[4]	Oak
William Guerra	Oak
John P. Gwin[4]	Oak

18. The Management Board has met approximately on a bi-monthly basis with at least one representative from each of the joint venturers in attendance (Video 44 Ex. 18, p. 11). Board members communicate with each other by telephone or correspondence regarding station business (Video 44 Ex. 18, p. 10). The day-to-day operation of the station has been delegated to a General Manager, who has been given "considerable" autonomy subject to supervision by the Board (Video 44 Ex. 17, pp. 1-2).

19. Irving B. Harris: Mr. Harris, Director of Harriscope of Chicago, is one of two members of the Video 44 Management Board who reside in the Chicago area (Video 4 Ex. 19, p. 2). Mr. Harris estimates that he devotes approximately seven to ten hours each month to station matters. Irving Harris' participation in the station currently consists of telephone conferences with

[4] An Ownership Report which was filed March 1, 1984, on behalf of Video 44, reported the resignation of John P. Gwin and Ronald S. Comm from their positions representing Oak on the Video 44 Management Board and their replacement by Ira. E. Ritter and Thomas C. Runge, effective January 31, 1984.

Burt Harris concerning the station's performance and its financial situation. He generally does not attend Management Board meetings, as they frequently are held in Los Angeles (Video 44 Ex. 19, p. 4).

20. Irving Harris has been active in civic and cultural organizations. Currently, he is a Life Trustee of the University of Chicago, a Trustee of the American Jewish Committee, and a Trustee of the National Center for Clinical Infant Programs. He is a former President (1958–61) of the Michael Reese Hospital and Medical Center; former Chairman (1970–81) and current Honorary Chairman of Prime Time School Television, an organization which prepares written materials for teachers concerning prime time television programs of value to students; and, former President (1965–75) and current Trustee of Chicago Institute for Psychonalysis. He is currently President Emeritus (having been President from 1966 to 1983) and Founder of the Erikson Institute for Early Education, which provides postgraduate training for preschool teachers in affiliation with Loyola University, Chicago. Mr. Harris also is the President of the Ounce of Prevention Fund, which funds social service agencies in Illinois, and he serves as Chairman of Family Focus, Inc., a private social service agency (Video 44 Ex. 19, pp. 2–3).

21. Alan T. Silverman: The other Video 44 Management Board member who resides in the Chicago area is Alan T. Silverman, President and Director of Essaness (Video 44 Ex. 21, p. 1). Mr. Silverman estimates that he regularly spends between fifteen and twenty hours each month on matters relating to the operation and performance of WSNS-TV. Specifically, he spends approximately one hour a week reviewing STV programming acquisitions for the station, and he has monthly meetings with representatives of Oak to discuss future acquisitions. Mr. Silverman also confers by telephone with Burt Harris one to two hours each week, and he has occasional discussions regarding programming matters with Jack Rosenthal and Richard Plotkin, the current manager of WSNS-TV. Alan Silverman attends the Video 44 Management Board meetings on behalf of Essaness. His time commitment to the station has increased during the time periods (every two to three years) that he has participated in contract negotiations with unions represented at the station (Video 44 Ex. 21, pp. 4–5).

22. Alan Silverman is a former Director (1972–78) and Chairman of the Nominating Committee (1974–77) of the American Cancer Society of Illinois (Video 44 Ex. 21, p. 1).

23. Other Members of the Management Board: Jack Rosenthal, a resident of Casper, Wyoming, and Vice President and Director of Harriscope of Chicago (Video 44 Ex. 17, p. 4) has had the primary responsibility for overseeing day-to-day operations of WSNS-TV (Video 44 Ex. 18, p. 10). In this regard, Mr. Rosenthal has visited the station around eight times a year. He also confers with Burt Harris several times a week by phone (Video 44 Ex. 18, p. 10). He estimates that during a typical week, he spends at least five hours reviewing station affairs (Video 44 Ex. 20, p. 5). Mr. Rosenthal has attended Management Board meeting from time to time, although Burt Harris generally attends on behalf of Harriscope of Chicago (Video 44 Ex. 20, pp. 5–6).

24. Burt Harris, President and Director of Harriscope of Chicago, is a resident of Los Angeles, California (Video 44 Ex. 17, p. 4). He estimates that he spends 13 to 15 hours a month in connection with his responsibilities for the operation of WSNS-TV. In particular, along with frequent telephone conversations and meetings with Management Board members, and visits at least twice a year to WSNS-TV, Burt Harris devotes at least one hour per month to the review of the station's financial information, and prepares periodic financial statements concerning the station's operation for presentation to the joint venturers (Video 44 Ex. 18, pp. 10–12).

25. Ronald S. Comm, William Guerra and John P. Gwin reside in California (Video 44 Ex. 17, p. 6). As indicated *supra*, Messrs. Comm and Gwin have recently been replaced by Era E. Riter and Thomas C. Runge, who are also residents of California. Ownership Report filed March 1, 1984.

Video 44's Past Record—1979-1982 License Term

26. During the license period commencing December 1, 1979, WSNS-TV evolved from a commercial UHF TV station presenting conventional programming approximately 17 hours a day on weekdays and 18 hours a day on weekends, to a subscription television station broadcasting 24 hours a day, seven days a week, with all but five hours a week, namely from 6:00–7:00 AM Monday–Friday, being in the scrambled mode. The subscription TV service commenced on a limited basis on September 22, 1980, i.e. 46 hours a week in STV, 7:00 PM–1:00 AM on weekdays, 5:00 PM–1:00 AM on weekends, with 73 hours a week remaining in the

[5] WSNS commenced programming in the subscription mode on a limited test basis between September 10–22, 1980 (Video Ex. 24).

conventional mode. Thereafter, the number and percentage of hours devoted to STV service increased in three stages. Between November 9, 1981 and June 1, 1982, WSNS broadcast approximately 59 hours of conventional programming weekly and 66 hours in subscription mode. Conventional programming was presented between 8:00 a.m. and 5:00 p.m. weekdays; and subscription programming was broadcast from 5:00 p.m. until approximately 4:00 a.m. of the next week. Conventional programming was broadcast on Saturday from 7:00 a.m. until 3:00 p.m. and on Sunday from 6:30 a.m. until 3:00 p.m.; subscription programming was broadcast on the weekends from 3:00 p.m. until approximately 4:00 a.m. Between June 1, 1982 and August 23, 1982, WSNS broadcast approximately 133 hours weekly of scrambled programming and 30 hours of conventional programming. Conventional programming was presented from 2:30 to 9:00 a.m. each weekday. Subscription programming was broadcast from 9:00 a.m. until approximately 2:00 a.m. on weekdays and continuously on weekends. Between August 23, 1982 and November 30, 1982 (the end of the 1979-1982 License term), WSNS broadcast approximately 163 hours a week in scrambled mode and 5 hours a week in conventional mode. Conventional programming was broadcast on weekdays from 6:00-7:00 a.m.

27. Station personnel conducted annual community leader surveys during 1980, 1981 and through July 1982 (Video Ex. 3, pp. 2-3). Linda Frost, Director of Public Affairs for the licensee, reviewed the community problems and needs identified in each of the surveys. Based on her analysis of the interviews, she prepared annual lists of the ten problem areas most frequently identified (Video Ex. 3, pp. 1-3). The lists of major problems ascertained for the years encompassed by the licensee period are:

1980

1. Education Health, Mental Health Economy
2. Housing
5. Unemployment
6. Problems of Minorities
7. Crime and the Criminal Justice System
8. Neighborhoods Inflation

10. Elderly Politics & Government (Video Ex. 3, p. 5).

1981

1. Education
2. Health and Mental Health
3. Housing
4. Economy
5. Unemployment
6. Government/Politics Problems of Minorities
8. Transportation
9. Crime & Criminal Justice System Families (Video Ex. 3, p. 6).

1982 (January—July)

1. Unemployment
2. Economy
3. Education
4. Crime/Criminal Justice System
5. Health
6. Problems of Minorities
7. Problems of Women
8. Families Transportation
10. Problems of Youth (Video Ex. 3, p. 7).

Non-Subscription Programming

Locally Produced Public Affairs Shows

Dimensions

28. "Dimensions" was a half hour interview program with in depth discussions on a featured topic. Linda Frost, Director of Public Affairs for WSNS-TV during the entire license period, was the Executive Producer of "Dimensions." She selected the topics for the show as well as the guests and was a frequent host for the program. She considered letters received by the station in her

selection of guests. WSNS produced and aired 128 different *Dimensions* programs during the 1979-1982 license term. The program was taped and rebroadcast two or three times a week. The show was aired frequently at 9:00 p.m., noon and 1:30 p.m. on Saturdays (Video Ex. 3, p. 3; Video Ex. 5, pp. 1-3; Video Ex. ID, pp. 235-301). The programs focused on areas and concerns that had been identified as major community problems, needs and interests, by the WSNS-TV community ascertainment efforts (Video Ex. 5, p. 3).

29. Ms. Frost also identified programming which she had selected as being illustrative responsive programming to the ascertained needs during the 1979-82 license period. Of the 38 programs identified as being responsive to ascertained community needs for the 1979-80 "Problems-Programs" list, 29 were "Dimensions" programs. They encompassed such diverse areas as health, the economy and inflation, unemployment, education, minorities, crime, housing (Video Ex. 2, pp. 3-19; Video Ex. 3, pp. 8-12). Of the 39 programs identified as being responsive to ascertained community needs for 1980-81, 37 were "Dimensions" programs (Video Ex. 3, pp. 13-17). All 25 programs selected by Ms. Frost as being responsive to ascertained community needs for 1981-82 were "Dimensions" programs (Video Ex. 3, pp. 18-21).

30. Ms. Frost received positive letters and comments from viewers stating that "Dimensions" performed a valuable service (Video Ex. 5, p. 4). Additionally, 51 persons who appeared on Dimensions furnished affidavits stating that they believed their appearance gave them an excellent opportunity to discuss a particular topic and to inform viewers with respect to that topic (Video Ex. 6).

31. The "Dimensions" program was terminated on June 4, 1982 (Video Ex. 1D, p. 301). It was terminated because the station sought to extend its STV hours and it was more economical to get public affairs programming from another source (Tr. 433). According to General Manager Morris,[5a] it was more economical to discontinue "Dimensions" because Video would no longer have to utilize studios and personnel for live programming (Tr. 441-42).

Coping

32. The program "Coping" was locally produced for WSNS-TV, by Robert L. Krit, Vice-President for Development of the Univer-

[5a] Edward L. Morris served as vice president and general manager of WSNS-TV from February 15, 1972 to December 31, 1982 (Tr. 390).

sity of Health Sciences at the Chicago Medical School. According to Krit, the program was an important part of the Institute's efforts to educate the public concerning significant health issues. "Coping" featured a half hour interview format, and was broadcast on the first Monday of the month commencing on December 3, 1979 and terminating July 6, 1981. "Coping" was a half-hour program, with Krit and Arthur Snider, a medical columnist for a a local Chicago newspaper, acting as hosts. It followed an interview format with each program having one or more guests who were eminent medical professionals in their respective fields. WSNS was involved in the selection of topics for the programs although the selection of guests was left to the discretion of Mr. Krit. The host gave guests as much time as possible to impart information about the problem under consideration, utilizing discussions about symptoms, detection and illness, treatment, prevention and control. The program covered the spectrum of medical and psychological problems, and used visual aids. "Coping" also presented special programs such as for heart month, and the handicapped. According to Krit, WSNS-TV was very cooperative in meeting the needs and the demands of the program (Video Ex. 7, pp. 1-6, 9-10; Tr. 576-78).

33. Overall, 21 "Coping" programs were broadcast. Originally it commenced at 9:30 p.m. on Monday, but as of January 5, 1981 it was switched to 5:30 p.m. (Video Ex. 1D, pp. 228-234). Of the 38 programs identified by Linda Frost as being responsive to 1979-80 ascertained needs, eight were "Coping" programs (Video Ex. 3, pp. 8-12). Of the 39 programs identified by Frost as being responsive to 1980-81 ascertained needs, two were "Coping" programs (Video Ex. 3, pp. 13-17). Twelve medical experts who participated in various "Coping" shows during the license period testified as to the merits of the program in meeting needs of TV viewers (Video Ex. 8). WSNS-TV broadcast "Coping" until July 6, 1981, when the program lost its sponsor, Commonwealth Edison. After funding was lost, WSNS-TV worked with the Institute of Medicine of Chicago to obtain alternate funding or a new sponsor, but was unsuccessful (Video Ex. 7, pp. 10-11; Tr. 467).

Non-Locally Produced Public Affairs Programs

Health Field

34. "Health Field" is produced in New York, syndicated by the

National Broadcasting Company and carried by NBC's affiliated station in Chicago as well as by WSNS-TV (Tr. 470–71). The syndicated program was aired on WSNS-TV beginning September 13, 1981 and continuing through the end of the license term. It examined topical health and medical subjects through interviews conducted by Dr. Frank Field, his daughter Pam and with prominent physicians, health professionals and other experts in related fields from around the country and world. The thirty minute program which was generally organized around a weekly theme was originally broadcast twice a week—on Sunday at 6:30 a.m., then rebroadcast on Monday at 4:30 p.m; the Monday broadcast was then changed to noon; then, as of May, 1982, "Health Field" was broadcast each weekday at 5:00 a.m. and from August 23, 1982 was broadcast each weekday at 6:00 a.m. (Video Ex. 14, pp. 1–3, Video Ex. 10, pp. 304–69). WSNS had no input into the topics that were covered on the program. Since "Health Field" was a syndicated show, the station broadcast whatever programs were presented to it (Tr. 578–79, 895).

Illinois Press

35. Carl Caldwell was the host and producer of the syndicated thirty minute public affairs program "Illinois Press." The program is produced at WILL–TV, an educational station licensed to the University of Illinois and located in Champaign-Urbana. The program is funded by the University of Illinois, the state of Illinois and corporate sponsors. The format of the program is similar to "Meet the Press" (Video Ex. 10, p. 1). According to Caldwell, the topics are of general concern to all Illinois residents irrespective of their geographical location within the state. Of the 75 programs broadcast during the license term, Caldwell listed the following programs as having special, geographical relevance to the Chicago metropolitan area: February 5, April 23, May 5, 1982—discussion of mass transit in Chicago; March 5, 1982—flooding problems in Northern Illinois including the Chicago area; July 2, 1982—problems in the housing industry including housing starts in the Chicago area; November 19, 1982—discussion of votes turnout in the 1982 elections including black voters turnout in Cook County (Video Ex. 32, p. 2). None of the "Illinois Press" programs were listed by Frost as responsive to ascertained needs (Tr. 779). The program was first broadcast on June 12, 1981 and continued to be broadcast on Fridays at 8:00 a.m. through May 28, 1982. Commencing on June 4, 1982, the show was broadcast

on Friday mornings at 7:00 a.m. and rebroadcast on Mondays at 5:30 a.m. Starting August 20, 1982, the program was broadcast at 6:30 a.m. on Fridays and rebroadcast at the same time on Mondays, through the remainder of the license period (Video Ex. 1D, pp. 372–397, Tr. 648). For purposes of calculating WSNS' percentage of public affairs programming, the rebroadcasts were included (Tr. 647–8).

Other Locally Produced Non-Entertainment Programs

AM LaSalle Street[6]

36. John Dickinson, a producer and director at WSNS-TV during the license period, was the producer of this business news program which was broadcast between June 1, 1981 and October 30, 1981. The program was locally produced by WSNS and broadcast each weekday from 6:00–8:00 a.m. The basic format included live general news, including weather reports and sports, with the emphasis on financial information; a commodities hotline; expert interviewees; stock market reports; financial stories; interviews with corporate executives; and world market outlook. The basic one hour format was essentially repeated during the second hour (Video Ex. 9, pp. 1–4; Video Ex. 1D, pp. 199–227). "AM LaSalle Street" was an experiment to see if the station could develop a commercially successful business program (Tr. 459). The show tried to reach the experienced and inexperienced investor, commodities broker, or stockbroker. WSNS-TV cancelled the show after five months, because it was unable to generate sufficient advertising revenues (Video Ex. 9, p. 506; Tr. 469).

Neighborhood Notes

37. WSNS aired "Neighborhood Notes" from December 1979 to September 1981. The idea was to provide a forum for worthwhile local organizations to make announcements of public interest and to communicate their message to a larger segment of the Chicago area community (Video Ex. 15, p. 1). Each segment was 30 seconds long and contained two public service announcements. There were about 5–6 individual "Neighborhood Notes" segments aired in rotation on the station, with each segment being broadcast four to five times. The locally produced segments were hosted by the WSNS Public Affairs Director. WSNS assisted in

[6] WSNS classified this entire program as news (See e.g., Video Ex. 1B, p. 2).

the packaging of the announcements for broadcast and was especially receptive to announcements from groups that provided services for the benefit of the elderly, the mentally retarded, minority groups and women (Video Ex. 10, pp. 399–416; Ex. 15, pp. 2–3). The station received favorable responses to "Neighborhood Notes" from groups who viewed the announcements, as well as those on whose behalf the announcements were made (Video Ex. 15, p. 4). "Neighborhood Notes" was discontinued because the station no longer wanted to spend the studio and crew time necessary to produce it. They were receiving a large number of PSA's and felt it was something that they did not need to do any more (Tr. 471).

Non-locally produced non-entertainment programs

TV College[7]

38. The city colleges of Chicago are the producers of "TV College" which was broadcast on WSNS-TV through July 1982. The syndicated show consisted of a series of college level courses offered for credit. The courses themselves are either locally produced or acquired by the city colleges for broadcast. During the license period, courses were offered in astronomy, biology, business, child development, data processing, health, humanities, etc. Students enroll with the city colleges in the TV College course they wish to take. They watch TV for lessons and assignments. According to the Chancellor of City College of Chicago, Dr. Salvatore Rotella, the program is valuable because it enables persons who are unable to attend college in person the opportunity to continue their college education (Video Ex. 1D, pp. 480–605; Video Ex. 12, pp. 1–4). WSNS-TV provided staff and studio facilities to City College to present the program. The station even continued carrying the program beyond its contractual obligation to allow for the completion of the semester curriculum (Video Ex. 12, p. 5). The courses were generally broadcast for one hour on Monday through Thursday mornings and for four hours on Saturday mornings (Video Ex. 1D, pp. 480–510). TV College went to another station in July 1982 because WSNS changed its schedule. The program required a greater number of hours which were no longer available beause the station went to more STV (Tr. 463).

[7] WSNS classified these programs as educational (See e.g., Video Ex. 1B, p. 10).

Religious

700 Club

39. The "700 Club" is a production of the Christian Broadcasting Network (CBN) and was broadcast over WSNS TV through February 1982 when CBN chose another affiliate. From the start of the license period through August 1980 each 90 minute show was broadcast in the morning and repeated in the evening. When CBN obtained access to satellite distribution as of September 1980 it broadcast from 9-10:30 a.m. and repeated at 1-2:30 p.m. The station also broadcast "Best of the 700 Club" at noon on Saturdays (Video Ex. 13, p. 1; Tr. 464-5). Each broadcast and rebroadcast was credited separately for purposes of calculating the programming percentages (Tr. 567). The program was hosted in a "magazine" format before a live studio audience by Pat Robinson and Ben Kinchlow. The programs consisted of various segments of news, public affairs, instruction, information and entertainment interspursed with religious material and gospel music (Video Ex. 13, p. 2; Ex. 33a).[8]

40. In addition to the "700 Club" WSNS aired a number of religious programs during the license period. Among the regularly scheduled religious programs aired for a substantial portion of the license period were one hour religious gospel programs of Jimmy Swaggart, Jerry Falwell, and "The Ernest Angley Hour" and half hour gospel programs such as "It Is Written", "Reverend Nelson Patterson", "The King Is Coming", and "Oral Roberts" (Video Ex. 16, pp. 11-12). The station also broadcast a number of religious dramas during the license period. Religious specials and telethons were aired (Video Ex. 16, pp. 12-13). The station never carried live religious programs from churches or synagogues because it did not have a remote unit (Tr. 466).

Other Programming

Mundo Hispano

41. "Mundo Hispano" was a 60 minute Spanish Language

[8] The "700 Club" also ran on occasion in 1981 and 1982 on two other Chicago stations (WFLO and WCFC). Both stations logged the program as entirely religious (Tr. 1054). Video 44 also during the licensed term, logged the "700 Club" programs as entirely religious and treated the program as religious in its annual 1980 programming report (Video Ex. 30, p. 1; Tr. 258). However, as discussed, *infra*, for purposes of the hearing, at the behest of counsel, portions of the "700 Club" have been reclassified as news and public affairs.

program broadcast each weekday on WSNS.[9] It was generally carried during the mid to late morning hours. The program ran through May 1982 and during its last year on the station was broadcast from 9:30–10:30 a.m. It was broadcast on a "brokered" basis. That is, its producer purchased time on the station and acquired, on his own, programming for presentation and sold commercial time. The program content of "Mundo Hispano" was almost exclusively novellas, or soap operas, which were originally produced in Latin American countries (Video Ex. 11, p. 1). According to its producer, the show was enormously popular with viewers, in part, because for years it had been the only Spanish language program broadcast during daytime hours in Chicago (Video Ex. 11, p. 2). On occasion, he also produced documentaries and purchased time to have them broadcast over WSNS (Video Ex. 11, p. 5). "Mundo Hispano" was terminated by its producer because he was concerned that with the advent of increased STV programming the program would eventually move to another station. The program terminated on WSNS in May 1982 (Video Ex. 11, p. 3).

Special programming

42. WSNS broadcast certain non-entertainment programming that was not part of its regular program schedule. "The Salt Syndrome," a two part presentation on the Strategic Arms Limitation Talks, presented two viewpoints concerning the talks. One of the discussants praised the station for airing the subject (Video Ex. 16, p. 19; attachment 4). Another special program was "The University of Illinois: An Annual Report," which was broadcast in June 1982 and discussed developments at the University. The University expressed appreciation for the station's support (Video Ex. 16, p. 19; attachment 5). Another series of special broadcasts was entitled "Out and About." This series, produced by students at Southern Illinois University, dealt with the history and culture of Southern Illinois. The program was broadcast on Tuesday mornings, generally at 6:30 a.m., principally in the last months of the license period. The supervisor of the student program expressed appreciation for exposing the students' talents to the Chicago market. The licensee classified these programs as public affairs (Video Ex. 16, p. 20; attachment 6; see e.g., Video Ex. 1B, p. 465). Finally, in 1980 and 1981, the licensee

[9] "Mundo Hispano" was classified as entertainment by the licensee (Video Ex. 1B, p. 200).

aired The Eastern Seal Telethon, during its non-STV hours. The Easter Seal Society expressed appreciation to the station for the critical role it played in the fundraising efforts (Video Ex. 16, pp. 20-21; attachment 7).

Sports Programming

43. During the entire license term, WSNS carried a variety of sports programming including broadcasts of baseball games, basketball games, hockey games, soccer games, football games, tennis matches, golf tournaments and sports highlights and variety programs. Sports programming formed a significant part of the overall programming schedule during the license term.[10] In 1980 the station broadcast the Chicago White Sox games with related interview shows. The station broadcast University of Illinois basketball games live during the 1979-1982 basketball seasons. During the latter two seasons they were principally aired in the scrambled mode. Professional hockey games were broadcast with the 1982 Stanley Cup games being in the subscription mode (Video Ex. 16, pp. 1-5).

Other Entertainment Programming

44. During the license term, WSNS broadcast approximately 420 different feature-length motion pictures in the nonsubscription mode. Among the films are versions of several works by William Shakespeare; a Prokofiev ballet; adaptations of Pulitzer Prize winning plays by Thornton Wilder and Elmer Rice; and adaptations of novels by Leo Tolstoy, Ernest Hemingway, Joseph Conrad, George Orwell, Theodore Dreiser and Franz Kafka (Video Ex. 16, pp. 27, 31, 33-34, 37 & 39-42). Among the entertainment programming for children presented by WSNS during the license term were episodes of the *Leave It To Beaver* program, an animated series of *Beatles* cartoon programs, and feature length entertainment films for children such as the *Adventures of Sinbad the Sailor*, *Bill and Coo*, *Captain Kid*, *Flying Deuces*, *Gulliver's Travels*, *The Little Princess*, *The Littlest Warrior*, *Mad Monster Party*, *Panda and the Magic Serpent*, *The Red Balloon* and *Santa Claus Conquers the Martians* (*Id.* at 14, 32, 34 & 39).

[10] Overall, 8.06% of WSNS's prime time broadcast hours during the license term were devoted to sports programming (Video Ex. 30C, p. 52).

Subscription Television (Scrambled) Programming

Specials and Series

45. The station broadcast in the scrambled mode a variety of filmed musical concerts, dramas, films of stage plays and performances, and musicals. In addition, its STV lineup included such programming as the "Jane Fonda Workout Show," "Aerobicises," and "Numero Uno," which was a series of fourteen one-half hour documentaries about great olympic athletes and other major sports figures. From September through November 1982 the station broadcast the multi-part documentary series, "Vietnam; The Ten Thousand Day War." The series was generally presented on Sundays at 5:00 p.m. and then rebroadcast the following Saturday at 4:00 p.m. although there were occasions when there was no rebroadcast or where the schedule varied. This series was classified as public affairs by the licensee (Video Ex. 16, pp. 16-19; Video Ex. 1D, pp. 457-556).

Feature Films

46. Between September of 1980, when the station began to broadcast some of its programming in the scrambled mode, and the end of the license term, WSNS broadcast approximately 800 to 1000 feature films in the scrambled mode. Such features included recent films such as "Star Wars," and "Kramer v. Kramer," older films such as "Dr. Zhivago" and "The Godfather," children's films such as "Willy Wonka and the Chocolate Factory"; classics such as "The High and the Mighty," and foreign films such as "The 400 Blows" (Video 16; pp. 9-11; attachment 2).

47. WSNS broadcast various sports events as part of its subscription television service during the 1979-1982 license term (Video Ex. 16, p. 3, 5). During the 1980-1981 basketball season, the station broadcast live coverage of approximately 12 college basketball games in the subscription mode. *Id.* p. 3. During the 1981-1982 basketball season, WSNS broadcast 11 University of Illinois college basketball game live in the subscription mode. *Id.* During the 1981-1982 hockey season, WSNS broadcast 4 Chicago Black Hawks professional hockey games, including 3 games of the Stanley Cup playoffs, in the subscription mode. *Id.* at 3, 4. The station also carried live, subscription-mode telecasts of World Class Boxing matches on July 21, August 18, September 15, October 20, and November 17, 1982. *Id.* p. 5. On July 24 and 25,

1982, WSNS broadcast in the subscription mode a live telecast of the Michelob Championship Tennis Matches. *Id.* In November 1982, the station broadcast the college basketball all-star game in the subscription mode. *Id.* WSNS also broadcast two Chicago Sting professional soccer games in the subscription mode in December 1980. *Id.*

Adult Program Segment

48. At the inception of STV programming, there were no "adult fare" films. Thereafter, about October-November 1981, "adult fare" was presented for about an hour and a half, three or four nights a week with more on weekends. In about July 1982, with the expansion of STV programming, the station expanded its "adult fare" so that "adult fare" films became an integral part of WSNS overall programming format (Tr. 610). The "adult fare" programming was tiered, meaning that the viewer had to pay extra to see the adults only programming (Tr. 680). The films in the "adult fare" genre featured explicit sex, nudity, violence and other mature subject matter (Monroe Exs. 6 and 9; Tr. 681).[10a] The adult programming segment commences at approximately 11:00 p.m. (Tr. 676). At times it is preceded by the program "Playboy on the Air" or the program "Anything Goes" (Tr. 683-85). These programs are telecast in the regular STV mode, not in the adult segment for which special payment is made (Tr. 685)."Playboy on the Air" contains depictions of sexual manipulation, intercourse and nudity (Tr. 683-84). "Anything Goes" is a game show like strip-poker on which the participants remove their clothes (Tr. 683).

49. During the period commencing August 23, 1982, when Station WSNS-TV began broadcasting 163 out of 168 hours in the scrambled mode, its public affairs programming was limited to two scheduled programs in the unscrambled mode: "Health Field" which was presented from 6:00-6:30 a.m., Monday-Friday and Illinois Press which was presented at 6:30 a.m. on Friday and rebroadcast at the same time on Monday. The program series "Out and About", which was classified as public affairs by the licensee was broadcast in the unscrambled mode on Tuesday mornings generally at 6:30 a.m. through November 16, 1982.[11] During this period the station also presented "Vietnam" The Ten

[10a] The station made "lock boxes" available for a $10.00 fee permitting subscribers to control access to the service (Tr. 1126, 1138-39, 1146).

[11] Out and About was classified as "Other" for August 24, 1982 (Video Ex. 1B, p. 458).

Thousand Day War" in the scrambled mode in approximately 25, 49 minute broadcasts including repeats (Video Ex. 1B, pp. 457-566). The percentages of public affairs programming for September-November were 2.63, 2.84, and 3.02, respectively[12] (Video 30D-149-154). There were no station produced or local programs presented during this period (Monroe Exs. 24 and 25). There were no news programs. There were no religious programs (Video Ex, 1B, pp. 457-566, Tr. 395-6). All PSA's that were broadcast were within the 6:00-7:00 a.m. time period and local PSA's for September-November amounted to 0.05, 0.03, 0.04 percent, respectively, of the total broadcast time as compared to a minimum of 0.1 percent for any prior month (Video Ex. 38). Programming classified as "other" for this period was limited to "Aerobicises," and "Jane Fonda's Workouts" in the scrambled mode, and a series of programs in the unscrambled mode which covered a wide range of subjects including features on people in foreign lands, scenic areas within the United States, scientific projects and the NASA program and were generally broadcast twice a week on Wednesday and Thursday mornings at 6:30 a.m. (Video Ex. 1B, pp. 457-566). The percentages for "other" programming for September-November were 1.66, 1.32 and 2.45, respectively, Video Ex. 30D, pp. 149-154).

50. With respect to the scheduling of all the public affairs programming and public service announcements during the 6:00-7:00 a.m. period Monday-Friday, Edward Morris, General Manager of the station explained that this was the time they could present such programs most effectively without changing the STV schedule which was oriented to entertainment, movies and sports (Tr. 404-5). It was more convenient to schedule such programming at one hour on a specific day so as not to interfere with the entertainment programming (Tr. 409, 412). Morris felt that the station could reach more people at this hour while they were preparing for work and were more likely to take in such programming than during hours when they were looking for entertainment. It didn't make sense to him to broadcast public affairs in the evening because of competition and because it would interfere with their STV mode (Tr. 406). He explained that the station tried to counterprogram with public affairs and public service programs at times they felt they could get an audience (Tr. 408). He considered such programs as "Illinois Press" and "Health Field" to be "enhanced radio" in that people can hear the

[12] This is percentage of total broadcast hours.

program without watching it and derive information (Tr. 410).

51. The Households Using Television (HUT) ratings demonstrate for the time periods 6:00–6:30 a.m. and 6:30–7:00 a.m. the rating are 4 and 6–8, respectively. Moreover, there is no other time period as low as 6:00–7:00 a.m. These figures compare with a HUT rating of 55 for Saturday at 9:30 a.m., when the station used to carry the locally produced public affairs program "Dimensions" at the commencement of the license period (Monroe Ex. 32).

Public Service Announcements

52. In the 1979 license renewal application WSNS-TV proposed a minimum of 90 public service announcements per week and that 80 of these announcements would be telecast after 8:00 a.m. and before 11 p.m. (Monroe Ex. 9, FCC Form 303, Section IV, Question 10). With the advent of STV, in October 1980 Video 44 advised the Commission that the number of public service announcements was being reduced to 60 per week (Monroe Ex. 10). Video 44 described this as a pro rata reduction and made no reference to telecasting all or substantially all of the public service announcements prior to 8:00 a.m. or after 11:00 p.m. *Id.* In a letter to the FCC in November 1981 regarding an expansion of the STV operation, Video 44 did not mention any change in its public service announcements representations (Monroe Ex. 12). At the time of the filing of the November 1981 letter with the FCC, Video 44 placed a note in its local public file indicating that it proposed to telecast 49 public service announcements per week (Monroe Ex. 11). This note was not filed with the Commission (Tr. 423). This note contained no reference to carrying such PSA's outside the 8:00 a.m.–11:00 p.m. time period. *Id.*

53. For the entire license term, WSNS-TV presented an average of about 90 public service announcements per week (Video 44 Ex. 30D, p. 52): 14,175 PSA's over a 156 week period. However, during the period September, October and November 1982, reflecting the typical program service of WSNS-TV after conversion to virtual full-time STV operation (Tr. 314), WSNS-TV did not fulfill either the 60 PSA per week numerical count reported to the Commission or the 49 PSA per week numerical count contained in the notation in its public file: In September 1982 it telecast 193 PSA's, an average of about 45 per week; in October 1982 it telecast 166 PSA's, an average of about 39 per week; in November 1982, it telecast 180 PSA's, an average of about 42 per

week (Video Ex. 30D, pp. 150, 152, 154). *All* of these public service announcements were telecast in the early weekday morning syndicated non-entertainment program block, prior to 8:00 a.m. (Video Ex. 1B, pp. 466–556; Tr. 424).

Viewer Comments

54. Letters from viewers in the station's public file[12a] contain favorable comments concerning programs that have been terminated: "Dimensions" (Monroe Ex. 30, p. 7, Ex. 31, pp. 16, 17, 20–21, 28, 31, 36, 48, 50, 82, 84–85, 89, 91, 93, 100, with a dissenting view, Ex. 31, p. 90); "Coping" (Monroe Ex. 31, pp. 43–44); "700 Club" and other religious programs (Monroe Ex. 30, pp. 1–1A, Ex. 31, pp. 9–10, 55, 68, 71, 86–87, with a dissenting view at p. 109; "Sha Na Na" (Monroe Ex. 13, pp. 60, 69–70, 74, 78–79, 95, 105–07, 120–25, with a dissenting view at pp. 80–81); "AM LaSalle Street" (Monroe Ex. 31, pp. 34–36, 42, 46, 51–52); "Leave It To Beaver" (Monroe Ex. 31, pp. 63–64, 67, 110–12, 116–19); "TV College" (Monroe Ex. 31, p. 15, with a dissenting view at p. 49); and others. Letters in the Commission complaint files[12b] are critical of program services that have been retained: brutal beating (Monroe Ex. 30, pp. 3–4); pay television (Monroe Ex. 30, pp. 6, 13–14, Ex. 31, pp. 78–79, 113–19); adult films, "Playboy" and language (Monroe Ex. 30, pp. 8, 9, 10, 15, 23, 24, 25–26, 27, 28, 29, 30, 31, 32, 36–37, 39–40, 45, 72–73); violence (Monroe Ex. 31, pp. 3–6). Virtually none of these letters is favorable to or in support of programming services that have been retained (Monroe Exs. 30–31). During the course of public hearings in Chicago a member of the general public came forward to volunteer testimony critical of the pay-TV operation of WSNS-TV and of its relegation of public affairs programming to the early morning hours (Tr. 1009–11). No public witnesses testified in favor of WSNS' STV programming.

Programming Statistics

55. The record contains an extensive amount of statistical information about WSNS programming during its 1979–1982 license term. This information was derived from the station's

[12a] The licensee's publi- file contained approximately 90 letters from viewers of the station relating to the station's performance during the license period (Monroe Ex. 31).

[12b] The Commission's complaint file contains approximately 22 letters (Monroe Ex. 30).

program logs and other sources, was processed by computers, and tabulated in printouts of programming information and statistics that show, among other things, the total time devoted to various categories of programming and the amount of such programming expressed as a percentage of total broadcast time (Video Exs. 1 & 30B–D). This statistical information has been presented for each of the three years of the license term and the full three year license term taken as a whole (Video Exs. 30B–D).[12c] The information has also been broken down to reflect percentages of programming broadcast during various parts of the day, including prime time. *Id.*

56. During the first year of the license term (December 1, 1979 through November 30, 1980), WSNS broadcast, on average, the following percentages of the following types of programming:

Program Type	*Percentage of Total Time Broadcasting*	*Percentage of Total Time Broadcasting* Between 6 am *and Midnight*	*Percentage of Total Time Broadcasting* in Prime Time *(5 pm to 10 pm)*
Public Affairs	1.05%	0.96%	1.93%
News	0%	0%	0%
All other Non-Entertainment Programming Exclusive of Sports	22.65%	24.31%	15.99%
Sports Programming	8.59%	9.37%	19.89%
Local Non-Entertainment Programming	1.23%	(Information not of record)	(Information not of record)
Total Local Programming	7.86%	(Information not of record)	(Information not of record)

(Video Ex. 30C, p. 54; Monroe Ex. 25; Video Ex. 38).[13,14]

[12c] The record also contains percentages of programming broadcast during the Commission designated composite weeks for 1981, 1982, 1983. Such data has not been included since the percentages, *infra*, based on an analysis of the station's program logs for the entire license period provides a more complete and accurate picture (See Video Ex. 1).

[13] The information concerning news, public affairs and "other" non-entertainment programming in this and the following tables is taken from the statistical volume (Video Ex. 30C) in which *The 700 Club* and *The Best of the 700 Club* programs broadcast between December 1, 1979 and February 28, 1981, have been classified entirely as religious programming, while The 700 Club programs

57. During the second year of the license term (December 1, 1980 through November 30, 1981), the station broadcast, on average, the following percentages of the following types of programming:

Program Type	*Percentage of Total Time Broadcasting*	*Percentage of Total Time Broadcasting Between 6 am and Midnight*	*Percentage of Total Time Broadcasting in Prime Time (5 pm to 10 pm)*
Public Affairs	3.63%	3.91%	0.13%
News	2.88%	3.10%	0%
All Other Non-Entertainment Programming Exclusive of Sports	16.04%	17.26%	1.43%
Sports Programming	2.08%	2.14%	1.79%
Local Non-Entertainment Programming	3.60%	(Information not of record)	(Information not of record)
Total Local Programming	4.36%	(Information not of record)	(Information not of record)

(Video Ex. 30C, p. 56; Monroe Ex. 25, Video Ex. 38).

58. During the third year of the station's license term (December 1, 1981 through November 30, 1982), WSNS broadcast, on average, the following percentages of the following types of programming:

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broadcast between March 1, 1981 and February 28, 1982 have been reclassified by segment (as news, public affairs, religious, entertainment, "other", *etc.*) in accordance with program type classifications supplied by the Christian Broadcasting Network (CBN) on rundown sheets for each program (Video Ex. 30A).

[14] The information concerning local programming given in the tables is derived from Monroe Ex. 25 and Video Ex. 38. Monroe Ex. 25 provides percentages for local programming on a monthly basis, but not on a yearly basis. To derive yearly figures, the twelve monthly percentages provided by Monroe were added together and then divided by twelve. Due to increases over time in the total number of hours WSNS was on the air during the license term, the method used to calculate annual percentages of local programming may not reflect with total accuracy what the actual yearly percentages were. The method should produce a reasonable approximation of the correct figure, however. The percentages of time devoted to locally produced public service announcements given in Video Ex. 38 have been included in the calculations made to arrive at the annual local programming percentages given in the tables.

Program	*Percentage of Total Time Broadcasting*	*Percentage of Total Time Broadcasting Between 6 am and Midnight*	*Percentage of Total Time Broadcasting in Prime Time (5 pm to 10 pm)*
Public Affairs	2.57%	2.90%	0.62%
News	0.08%	0.10%	0%
All other Non-Entertainment Programming Exclusive of Sports	5.84%	7.52%	0.75%
Sports Programming Local	1.01%	1.28%	2.47%
Non-Entertainment Programming	0.45%	(Information not of record)	(Information not of record)
Total Local Programming[15]	0.89%	(Information not of record)	(Information not of record)

(Video Ex. 30C, p. 58; Monroe Ex. 25; Video Ex. 38).

59. When the programming broadcast during the entire, three-year license term is considered as a whole, the station broadcast, overall, the following percentages of the following types of programming:

Program Type	*Percentage of Total Time Broadcasting*	*Percentage of Total Time Broadcasting Between 6 am and Midnight*	*Percentage of Total Time Broadcasting in Prime Time (5 pm to 10 pm)*
Public Affairs	2.44%	2.61%	0.89%
News	0.92%	1.07%	0%
All other Non-Entertainment Programming Exclusive of Sports	14.10%	16.19%	6.07%

[15] No local programming was carried in July, August, September, October, and November 1982 (Monroe Ex. 25).

Program Type	*Percentage of Total Time Broadcasting*	*Percentage of Total Time Broadcasting Between 6 am and Midnight*	*Percentage of Total Time Broadcasting in Prime Time (5 pm to 10 pm)*
Sports Programming	3.64%	4.17%	8.06%
Local Non-Entertainment Programming	1.76%	(information not of record)	(information not of record)
Total Local Programming	4.37%	(information not of record)	(information not of record)

(Video Ex. 30C, p. 58; Monroe Ex. 25; Video Ex. 38).

Comparison of WSNS-TV with other Chicago stations

60. During the 1979–1982 license term, there weretotal of eight Chicago area commercial television stations, four VHF and four UHF in operation during the entire years of the term. The commercial stations, other than WSNS-TV, are as follows: WBBM-TV, Channel 2, owned and operated by CBS, Inc.; WMAQ-TV, Channel 5, owned and operated by NBC, Inc.; WLS-TV, Channel 7, owned and operated by ABC, Inc.; WGN-TV, Channel 9, licensed to WGN Continental Broadcasting Company, a subsidiary of the Tribune Company; WFLD-TV, Channel 32, licensed to Field Communications Corporation; WCFC-TV, Channel 38, licensed to Christian Communications of Chicagoland, Inc.; and WCIU-TV, Channel 26, licensed to Wiegel Broadcasting Company (Video Ex. 23, p. 1–3).

61. The following chart sets forth the amount of news (N), public affairs (PA), and other non-entertainment, Non-sports (O) programming broadcast between 6 a.m. and midnight by the other seven television stations serving the Chicago area during the 1981, 1982, and 1983 composite weeks specified by the Commission.[16]

[16] The 1981 percentages for the seven other stations were taken from the Annual Programming Reports (FCC Forms 303-A) filed with the FCC. The 1982 and 1983 percentages are based on Video 44's analysis of programs logs for the 1982 and 1983 composite weeks obtained from the stations (Video Ex. 23, pp. 4–6). In this connection, the 700 Club programs run on other Chicago stations were logged as entirely religious. Video 44 did not reclassify these programs for purposes of its analysis.

	1981 Composite Week	*1982 Composite Week*	*1983 Composite Week*	*Cumulative Average*
WFLD-TV	(7452)	(7467)	(7484)[17]	(7468)
N	3.0%	2.7%	10.1%	5.3%
PA	2.6%[18]	3.7%	2.9%	3.1%
O	8.0%	7.9%	9.5%	8.5%
	13.6%	14.3%	22.4%	16.8%
WGN-TV	(7553)	(7560)	(7560)	(7558)
N	4.0%	4.8%	5.7%	4.8%
PA	3.3%	4.6%	1.5%	3.1%
O	6.2%	9.5%	6.4%	7.4%
	13.5%	18.8%	13.6%	15.3%
WMAQ-TV	(7512)	(7457)	(7512)	(7479)
N	14.4%	16.8%	15.6%	15.6%
PA	6.1%	3.4%	3.4%	4.3%
O	6.6%	5.6%	5.7%	6.0%
	17.1%	25.8%	24.7%	25.9%
WLS-TV	(7479)	(7452)	(7405)	(7445)
N	12.9%	17.4%	18.6%	16.3%
PA	8.7%	8.8%	5.6%	7.7%
O	6.4%	5.5%	4.5%	5.5%
	28.1%	31.7%	28.7%	29.5%
WBBM-TV	(7560)	(7560)	(7560)	(7560)
N	14.5%	15.5%	17.6%	15.9%
PA	6.7%	5.7%	7.9%	6.8%
O	10.5%	11.6%	9.3%	10.5%
	31.7%	32.8%	34.8%	33.1%
WCIU-TV	(6390)	(6800)	(6562)	(6584)
N	26.1%	20.2%	20.7%	22.2%
PA	10.7%	4.8%	3.9%	6.4%
O	11.8%	32.4%	31.3%	25.0%
	48.6%	56.4%	55.9%	53.6%
WCFC(TV)[18a]	(5946)	(6420)	(6724)	(6363)
N	0.0%	0.6%	0.4%	0.4%
PA	7.0%	3.6%	6.3%	5.7%
O	89.0%	94.5%	90.7%	91.5%
	96.3%	98.7%	97.6%	97.6%

Monroe Communications Corporation

62. Monroe is an Illinois corporation formed in October 1982

[17] The licensee's FCC Form 303-A reported PA performance as atypically low.

[18] Pages 49, 96-103, and 112 were missing from the WFLD-TV log for October 5, 1981.

[18a] WCFC(TV) broadcasts a full schedule of religious programming (Video Ex. 23, p. 3).

(Monroe Ex. 1, p. 3). The stockholders, officers and directors of Monroe are as follows (Monroe Ex. 1, App. A):

Shareholder	*Percentage of Voting Stock*	*Office*	*Director/ Executive Committee*
Robert L. Haag	36%	President	Yes
Howard N. Gilbert	15%	Vice President, Secretary	Yes
Wayne J. Fickinger	10%	Vice President	Yes
Arthur R. Velasquez	10%	Vice President	Yes
A. R. Umans	7 1/3%	—	Yes
Manfred Steinfeld	7 1/3%	—	No
Milton Podolsky	7 1/3%	—	No
Talmadge L. Hill	2%	—	No
Ruth M. Rothstein	2%	—	No
Calvin I. Leibovitz	1 1/2%	—	No
Leslie M. Fishman	1 1/2%	—	No

63. The principals of Monroe who have other media interests are as follows (Monroe Ex. 1, p. 8, App. B):

Monroe Principal	*Media Interest*
Howard N. Gilbert	Secretary, Director and 20% shareholder of Sharon Broadcasting Co., licensee of WGWY(AM), Charlotte, MI, and sole owner of Donna Broadcasting Co., Licensee of WYGR(AM), Wyoming, MI, and sole owner of Paul Broadcasting Co., assignees of license of WKGN(AM), Knoxville, TN.
	Secretary, Director of Paul Broadcasting Co;
	Secretary, Director and 9.3% shareholder of Fine Arts Broadcasting Co., licensee of WGLY(FM), Goulds, Florida.
Robert L. Haag	Vice President, Director and 20% shareholder of Sharon Broadcasting Co.
	Vice President, Director of Paul Broadcasting Co.;
	Director and 22.6% shareholder of Fine Arts Broadcasting Co.

A. R. Umans	President, Treasurer, Director and 20% shareholder of Sharon Broadcasting Co.;
	President, Director of Paul Broadcasting Co.;
	President, Treasurer, Director and 10.34% shareholder of Fine Arts Broadcasting Co.
Wayne J. Fickinger	Limited partnership interest (less than 1%) in Cablevision Programming Investments;
	Limited partnership interest (less than 1%) in Chicago Cablevision Investments.

64. None of the radio stations in which Messrs. Gilberg, Haag and Umans have interests is located in the Chicago area. WGWY in Charlotte, Michigan and WYGR in Wyoming, Michigan are daytime AM stations whose service areas do not overlap the service area of Monroe's proposed Chicago television station (Monroe Ex. 1, App. B). WGLY is a Class A FM station in Goulds, Florida. *Id.* The recently acquired WKGN is a Class IV AM station in Knoxville, Tennessee.[19]

65. Robert L. Haag: Mr. Haag, President and member of the Executive Committee and Board of Directors of Monroe, will be the Managing Director of the television station, overseeing the affairs and operation of the station on a day-to-day basis. He will maintain an office in the station's facilities. He proposes to devote an average of approximately 35 hours weekly to these functions (Monroe Ex. 1, p. 6).

66. Mr. Haag has a history of participation in civic affairs in the Chicago area. He has served on the Board of Governors of Skokie Valley Hospital (1973-77) and the Board of Directors of the Jewish Community Centers of Chicago (1972-81). He currently serves on the Board of Directors of the Chicago Chapter of the American Jewish Committee, and on the Board of Directors of the American-Israel Chamber of Commerce and Industry, of which he was President (1977-1979) and which honored him in 1976 as Industrialist of the Year (Monroe Ex. 1, p. 2).

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[19] Arthur R. Velasquez is Vice President, director and 45% shareholder of CID Broadcasting, Inc., applicant (File No. BP-800105AE) for a new AM station in Chicago, Illinois. Since the AM application was filed earlier, Mr. Velasquez will divest himself of his interest in Monroe in the event that the application of CID Broadcasting, Inc. should be granted (Monroe Ex. 2, pp. 3-4).

67. Arthur Velasquez: Mr. Velasquez, Vice President and member of the Executive Committee and Board of Directors of Monroe, will serve as a liaison between the television station and the Hispanic community of Chicago. He will have an active role in the planning, production and acquisition of Spanish programming, as well as in sales activities of the station (Monroe Ex. 2, p. 3). Mr. Velasquez will devote an average of 25 hours per week to the day-to-day operation of the station. *Id.*

68. Mr. Velasquez, born in 1938, is a native Chicagoan of Hispanic heritage. He has resided in Chicago his entire life with the exception of eighteen months when he served as a United States Army officer (Monroe Ex. 2, p. 1). Mr. Velasquez earned a Bachelor of Science degree in electrical engineering from the University of Notre Dame in 1960, and a Master's degree in business administration from the University of Chicago in 1967. He currently serves as the President and chief operating officer of Azteca Corn Products Corp., a Mexican food processing company which he founded in 1970, and which has become one of the top one hundred Hispanic-owned businesses in the country (Monroe Ex. 2, p. 2).

69. Mr. Velasquez has participated in local and statewide civic affairs. In 1974, he was elected to the Board of Trustees of the University of Illinois, marking the first state-wide election of an Hispanic to a statewide office in Illinois. He remained a Trustee of the University of Illinois until 1980. In 1981, 1983, he was elected to the Board of Directors of the Illinois Bell Telephone Company, a position which he will relinquish if Monroe is granted the construction permit for which it has applied (Monroe Ex. 2, p. 2). He currently serves on the boards of directors of the following civic groups: Mexican-American Legal Defense and Education Fund; Chicago Metro Junior Achievement; the Azteca Lions Club; and, Hispanic Housing Development Corp., for which he also serves as Vice President (Monroe Ex. 2, pp. 2-3).

70. Talmadge Hill: Mr. Hill will be employed on a full-time basis as the station's sports programming director and as a salesman (Monroe Ex. 3, p. 3). Mr. Hill is a black American. He was born in Winston-Salem, North Carolina in 1946, and he has resided in the Chicago area since 1973 (Monroe Ex. 3, p. 1). He received a Bachelor of Arts degree in physical education in 1970 from Catawba College, Salisbury, North Carolina, and he has earned credits toward a Master's Degree in education at North Carolina Central University. From 1970-1977, Mr. Hill played professional football for the Chicago Bears, Buffalo Bills, New

Orleans Saints and the Miami Dolphins of the National Football League. During the football off-seasons he was a junior high school teacher, teaching algebra, English, social studies, health and physical education in the public schools of Buffalo, New York and Chicago. From 1976–81, Mr. Hill was employed as director of commerical sales for the Danley Lumber Company, Westchester, Illinois. Thereafter, he joined Friden Alcatel, a manufacturer of electronic shipping and mailing equipment and office furniture, where he is currently a sales representative (Monroe Ex. 3, pp. 1–2).

71. Mr. Hill's civic activities have included an ongoing association with the Better Boys Foundation, a community-based social agency for Chicago's underprivileged black children. He has also been involved in fund raising efforts for the Hemophilia Foundation. From time to time, he has made public appearances for such groups as the NAACP and the National Urban League (Monroe Ex. 3, pp. 1–2).

72. Howard Gilbert, Wayne Fickinger and A. R. Umans: Messrs. Gilbert, Fickinger and Umans will each devote an average of approximately fifteen hours per month to their responsibilities as members of the Board of Directors and Executive Committee of Monroe (Monroe Ex. 1, p. 7).

73. Mr. Gilbert, age 55, is a native and life-long resident of the Chicago area. His activity in the civic affairs of Chicago include work with Mount Sinai Hospital Medical Center of Chicago (past President), Chicago Hospital Council, Jewish Federation of Metropolitan Chicago and Mayor Harold Washington's Transition Committee on Health Care. Mr. Gilbert, a lawyer, also provides *pro bono* legal services for inner-city and minority group causes (Monroe Ex. 1, p. 4).

74. Mr. Fickinger, age 57, is a native and current resident of the Chicago area. His civic activities include American Red Cross, National Association of Mental Health, Salvation Army and the University of Illinois, for which he serves as Vice Chairman of the James Webb Yound Fund (Monroe Ex. 1, p. 4).

75. Mr. Umans, age 56, has been a resident of Chicago for thirty years. His civic activities include Mount Sinai Medical Center of Chicago and the Hundred Club of Cook County (Monroe Ex. 1, p. 5).

CONCLUSIONS

Waiver Issue—Monroe

76. The findings demonstrate that Monroe principal Wayne J. Fickinger has passive, non-voting, fractional limited partnership interests in two cable television ventures, one of which has franchises for Evanston and Oak Park, which fall within the Grade B contour of Monroe's proposed station. As a limited partner, Fickinger has no power to direct the policies or operation of the cable ventures, nor does his small interest enable him to influence the policies or operations of the ventures. Moreover, Fickinger has committed to divest himself of these cable related interests in the event that Monroe's application for a construction permit is granted. Waiver of Section 76.501(a)(2) of the Commission's Rules is warranted. Accordingly, this issue is resolved in Monroe's favor.

Comparative Issue

Video 44's Past Broadcast Record

77. The Commission and the Courts have recognized that in a proceeding involving a renewal applicant and a mutually exclusive applicant, the incumbent licensee's past performance affords the Commission the strongest and most reasonable basis for determining whether the public interest will be served by the renewal of its license.[20] The strength of the expectancy depends on the merit of the past record. A substantial record of service translates into a comparative preference to be weighed against the other comparative factors and this preference is entitled to more weight than structural factors such as integration and diversification. An incumbent performing in a superior manner would receive an even stronger preference. An incumbent rendering minimal service would receive no preference.[21] The renewal expectancy must be

[20] *Citizens Communications Committee v. Federal Communications Commission*, 447 F.2d 1201, at 1208 (D.C. Cir. 1971); *Simon Geller*, 90 FCC 2d 250, at 270 (1982); *Broadcast Communications, Inc.*, 93 FCC 2d 1162 (Rev. Bd. 1983). The "renewal expectancy" is based on the concept that "the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service", *Citizens*, *supra*, 447 F.2d at 1213 n. 35.

[21] *Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1012–1013 (1981) *affirmed. Central Florida Enterprises, Inc. v. FCC* (Central Florida II, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 1774 (1983); *Radio Station WABZ, Inc.*, 90 FCC 2d 819 (1982), *affirmed*, *Victor Broadcasting, Inc.*, 722 F.2d 756 (D.C. Cir. 1983)

factored in for the benefit of the public and not for the benefit of the incumbent. *Central Florida II*, *supra*, 683 F.2d at 506. The "renewal expectancy" is justified on three grounds: (a) concern over the unknown quality of the challenger and, therefore, the possibility a denial of the incumbent's license renewal application may "deprive the community of an acceptable service and replace it with an inferior one"; (b) licensees should be encouraged to make investments to ensure quality service; and (c) avoidance of haphazard restructuring of the broadcast industry. *Cowles*, *supra*, 86 FCC 2d at 1013. With these principles in mind, it is appropriate to examine the broadcast record of WSNS-TV during the license term of December 1, 1979 to November 30, 1982.

78. The findings demonstrate that WSNS-TV evolved from a conventional UHF-TV station featuring films, children's programming, sports, and religious programs as well as locally produced public affairs programming during a 121 hour broadcast week to a full-time station operating in the STV format for 163 out of 168 hours of weekly programming. At the commencement of the licensed term, WSNS operated with local studios, telecast approximately 8% local programs, telecast approximately 24% non-entertainment programs and substantial numbers of public service announcements throughout various day parts including the prime evening viewing time period and enjoyed the support of the community, with little or no criticism of its program service. However, by the end of the license term, WSNS-TV had effectively shut down its studios, telecast no regular local programs, telecast 4-5% non-entertainment programs[22] and carried a drastically reduced PSA schedule, only in morning hours, none in prime evening time. In the course of its license term, the two locally produced programs "Dimensions" and "Coping", identified by the station as most responsive to ascertained community needs were terminated. Other non-entertainment programming terminated included "Neighborhood Notes", a station produced vehicle for local public service announcements, promoting primarily local community groups which ordinarily lacked access to city-wide publicity; "TV College", a daily instructional

[22] WSNS-TV's statistics showing percentages of total time broadcasting between 6 am and midnight for the third year of its license term (December 1, 1981 through November 30, 1982) show the following: Public affairs—2.90%, News—0.10%, Non-entertainment exclusive of Sports—7.52%. These statistics compare unfavorably with the program percentages of the other seven Chicago stations during similar time periods (See Finding 61). Also, WSNS-TV's statistics reflect total local programming of 0.89%. There are no statistics for local programming broadcast by the other Chicago stations.

program series produced by the City Colleges of Chicago; "AM LaSalle Street", a program of business news; and "Mundo Hispano," a daily Spanish language program series, carried on a paid, time brokerage basis. Thus, as of June 1982, WSNS-TV consisted essentially of uninterrupted wall-to-wall entertainment, primarily movies, with the exception of the early morning week day broadcasts of "Illinois Press", a syndicated one half hour interview program with a "Meet The Press" format focusing on state-wide problems and politics and "Health Field" a syndicated show focusing on health and related problems.[23] The record reflects no support for the program changes and considerable criticism of those changes by its viewers.

79. The Bureau and Video 44 urge the Presiding Judge to view WSNS-TV's three year license term on an overall basis, give credit to local and non-entertainment programming which has been abandoned, and accord Video 44 a renewal preference.[24] However, this approach misconstrues the renewal expectancy. The focus of the renewal expectancy is prospective rather than retrospective. A renewal expectancy is warranted not because the public interest was met during the expired term but because continued service by the licensee will better serve the public interest during the next term. As noted, *supra*, the reason that the Commission and the courts normally accord a license renewal preference over a new applicant is that an existing record of performance is more persuasive evidence of what can be expected in the future than is the purely prospective nature of a new applicant without an existing record of performance, however well intended that new applicant may be. The Commission normally looks to an entire license term since to select some briefer period of time may not give the Commission a representative picture of the licensee's actual performance. *Universal Communications Corp.*, 56 FCC 2d 445 (1975).[24a] However, reliance on a shorter time period is not unique. Thus, in a recent case, *United Broadcasting Company, Inc.*, FCC 84-639, released January 14, 1985, paragraph 13, the Commission agreed with the Review

[23] It should be noted that throughout its renewal period WSNS-TV did not maintain a news staff or carry local news. Its only news programming consisted of business news from "AM LaSalle Street" terminated on October 30, 1981 and the "700 Club" which was last broadcast on February 28, 1982.

[24] The Bureau takes the position that a renewal preference is warranted on the basis of WSNS-TV's performance during the beginning and middle of its license term but that WSNS-TV's performance in the latter part of its term did not warrant a preference.

[24a] This case does not involve a comparative renewal proceeding.

Board that WOOK's programming following its format change, which occurred after more than one third of the license term had expired, was most probative of the station's future performance. The record is clear that at the outset in 1979, WSNS-TV presented a program service generating one set of program statistics. As the metamorphosis to pay-TV programming occurred, those statistics changed. By the end of the license term in 1982, that metamorphosis was complete. There is no material dispute of fact about the program performance percentages, statistics or nature of the programs presented by WSNS-TV after its decision to commence virtually wall-to-wall STV programming. In light of the complete change in program operation, reliance on data based on programming which has been abandoned would not serve the public interest since it is not an indicator of WSNS-TV's prospective programming. In evaluating WSNS-TV's record, it is clear that the programming carried by WSNS-TV in the period following its decision to commence virtual wall-to-wall STV programming, rather than its overall programming during the entire license term, is the most reliable predictor of future service to the public.[25]

80. In evaluating an incumbent's broadcast record the Commission considers the following factors: (a) the regular presentation of a substantial amount of local programs with studios accessible to the community and its people, (b) use of the licensee's air time and resources to inform and stimulate the public with a substantial amount of non-entertainment programs, also public service announcements, in prime time and at other useful times of the day, and (c) evidence of support for and the absence of complaints about, the programming service of the licensee within the community served by the station. *Standards for Substantial Service*, 66 FCC 2d 419 (1977), *affirmed sub nom. National Black Media Coalition v. FCC*, 589 F.2d 578 (D.C. Cir. 1978); *Central Florida II*, *supra*; see also *United*, *supra*. It is concluded, based on the findings recited in paragraph 78, *supra*, concerning WSNS-TV programming toward the end of its license term, that WSNS-TV rendered a minimal service and is not deserving of a renewal preference. Summarized briefly, WSNS-TV broadcast no news, no regular local programs, and effectively shut down its studios,

[25] Admittedly, the period considered here is shorter than that deemed probative in United. However, the facts in this case are unique. The Presiding Judge is not aware of any comparative renewal case where an incumbent license has engaged in a massive abandonment of local and other public service programming in a manner that remotely resembles the practices of Video 44.

telecast 4-5% non-entertainment programs and a drastically reduced PSA schedule at undesirable time periods—none in prime evening time. More important, the records reflect no support for its programming change and extensive criticism of that change by its viewers. In *United*, in concluding that WOOK's record of service was substantial, the Commission noted that the "testimony of the community witnesses paints an impressive picture of WOOK (FM)'s responsiveness to the varied needs and interests of the community it serves" and that "a station's regular listeners are in the best position to judge the station's performance" (paragraph 13). Unlike the facts in United, neither community witnesses or its regular viewers testified in favor of WSNS-TV's changed programming.

81. This proceeding is the first comparative renewal proceeding involving an STV operation. However, that fact does not excuse WSNS-TV from the same public service obligations of other television broadcast licensees.

82. *In the 1968 Fourth Report and Order in Docket No. 11279*, 15 FCC 2d 466, 14 RR 2d 1601 (1968), *aff'd sub nom. National Association of Theatre Owners v. FCC*, 420 F.2d (D.C. 1969), *cert. denied*, 397 U.S. 922 (1979), establishing basis ground rules for STV operation following experimental operations dating back to the 1950's, the Commission stated:

> Concerning the conventional programming which STV stations will be required to carry, we have already indicated our belief that such programming will provide a valuable service to the community. Applicants for STV authorizations must, in addition to a showing with regard to subscription programming, also make a showing with regard to the conventional programming which they propose to broadcast in non-STV hours. This will have to be based on a survey of community needs with a showing of how the proposed programming is designed to meet those needs, just as with any application made by a non-STV television station. *We shall not consider that the STV applicant has met the standard with regard to conventional programming if it carries entirely, or almost entirely, industrial and other available free film programming. We shall expect STV stations to develop a staff—for programming, sales, news, engineering, etc.—which will perform the same functions as the staffs of conventional TV stations.* 14 RR 2d at 1714. [emphasis added].

In upholding that decision, the Court of Appeals relied upon the prospect that STV operations would result in greater diversity of programming, over and above entertainment and sports, stating: ": . . . the likely result of the Commission's action is to provide the public with additional information and ideas rather than repressing existing sources." 420 F.2d at 208.

83. The *Report and Order in Docket No. 21311*, 41 RR 2d 1491 (1977) and the *Report and Order in Docket No. 21489*, 42 RR 2d 1207 (1978), referred to in Video 44's Prop. Concls. Paras. 223-224, liberalized previous restrictions against the presentations of certain types of entertainment programs. There is nothing in the text or thrust of these decisions to suggest the Commission intended to alter its clearly-stated view that STV operation did not relieve licensees of non-entertainment public service programming obligations.

84. *The First Report and Order in Docket No. 21502*, 46 RR 2d 460 (1979), cited at Video 44's Prop. Concls. Paras. 225-226, likewise did not reflect any Commission intent that STV operations would be free of community or public service obligations. To the contrary, this action removed certain limits on the number of television channels that could be employed for STV operation for the purpose of giving STV a greater opportunity to demonstrate its ability to serve the community in diverse ways as a supplement to conventional television. In a passage omitted by Video 44, the Commission stated:

> We believe that this step [eliminating the one STV to the community rule] does not endanger the continued availability of a substantial amount of free television, but rather it holds the promise of more diversity in the mode and substance of its television fare. The growth of STV also promises greater opportunities in broadcasting for minorities and women and for small, independent business people. This, too, will aid in creating more specialized programming, thus better serving the country's diverse population. 46 RR 2d at 467.

85. The *Second Report and Order in Docket No. 21502*, 85 FCC 2d 631, 49 RR 2d 350 (Commission 1981), cited at Video 44 Prop. Concls. Para. 227, likewise did not accord STV any privileged public interest status vis-a-vis other television broadcast licensees. To the contrary, the Commission held that it would treat mutually exclusive STV and non-STV competing applicants on a par with each other in comparative hearings, without any special considerations to the STV applicant because of its pay-TV program service.

86. All of the above FCC decisions were made in the context that STV stations were required to provide a mix of conventional programming as well as pay-TV programming. This requirement was eliminated in the *Third Report and Order in Docket 21502*, 90 FCC 2d 341, 51 RR 2d 1173 (Commission 1982), *recon. denied*, 53 RR 2d 646 (1983) (Video 44 Prop. Concls. Para. 228-233). It was this action upon which Video 44 has primarily relied to justify its

abandonment of local programming and the use and placement of syndicated public service programming in early morning hours. However, it is crystal clear that the *Third Report and Order* did not absolve Video 44 from a continuing public service obligation. The Commission stated:

> We conclude that the '28 hour' rule places an unnecessary and potentially burdensome requirement on STV stations with no apparent concomitant public interest benefit. This rule may operate to restrict an STV licensee from exercising independent programming judgments, and it could prevent efficient programming determinations in response to audience demands for conventional and/or pay programming. If there is an audience for nonscrambled programming, STV licensees will find it in their interests to air such broadcasts. Community needs for conventional and pay programming differ and those relative needs should be adequately addressed and met by marketplace forces rather than an arbitrary government rule. Therefore, we are deleting the '28 hour' rule.
>
> However, an STV licensee will be expected to continue to meet its obligation to program in response to community needs. *No reasons were offered by commentators or are evident to us to indicate that STV and conventional licensees should have different obligations in this area.* However, we believe that the public interest will be better served if this basic obligation is fulfilled with the least government intrusion and with the most licensee flexibility. Therefore, we will allow an STV broadcaster to meet its programming repsonsibilities with either scrambled or conventional programming. In fact, permitting the former will allow the development of new types of nonentertainment programs designed for select audiences willing to pay for such broadcasts (narrow-casting). In our view, greater diversity in responsive programming will result from STV licensee's option to meet its programming responsibilities by conventional or scrambled means. *Subscription Television Service*, 90 FCC 2d 341, 51 RR 2d 1173, 1181 (Commission 1982). [emphasis added]

87. The *Fourth Report and Order in Docket No. 21502*, 54 RR 2d 1275 (Commission 1983), Video 44 Prop. Concls. Para. 234, modified the STV application form to delete requirements for programming and various other kinds of detailed information dating back to the initial STV application requirements established in 1969. However, *Fourth Report and Order* did not address or change the substantive public service programming obligation of STV stations that was made clear in the *Third Report and Order*, *supra*. Thus, a fair review of the Commission's regulatory treatment of STV establishes that subscription television licenses have an obligation to the public that is no less than the obligation of conventional television licensees, but can, at their election, meet their programming responsibilities by conventional or scrambled means. There is nothing in the thrust of any of these

decisions that would justify Video 44's abandonment of its public service programming.

88. Finally, it should be emphasized that the denial of a renewal expectancy does not run counter to the policy objectives which underlie that concept. First, for the reasons stated, *supra*, the community is not being deprived of an acceptable service. Second, there is not evidence that Video 44 has made investments to ensure quality services. On the contrary, WSNS-TV has drastically reduced its staff, terminated its regular local program service, and effectively shut down its studio. Finally, an adverse ruling against Video 44 will not result in a haphazard restructuring of the industry nor will it send a wrong signal to the industry as argued by Video 44. Thus, WSNS-TV's wholesale abandonment of public service programming is unprecendented and unlikely to be duplicated in the future by other licensees facing a challenge from a new applicant.

89. Since Video 44 receives no renewal preference, resolution of the comparative issue rests on consideration of the factors of diversification of control of the media of mass communications and integration of ownership and management. Monroe warrants a preference in each of these categories.[26]

Diversification

90. Principals of Monroe own four radio stations: two daytime AM stations in Charlotte, Michigan and Wyoming, Michigan, a Class IV AM station in Knoxville, Tennessee and a Class A FM station in Goulds, Florida. None of these stations serves the Chicago area. In contrast, principals of Video 44 have interests in seven television station (California, New Mexico, Montana, Wyoming and Florida), numerous television translators, one radio station (State of Wyoming), numerous cable interests, and other film and program production and distribution business interests. These, likewise, are not located in the Chicago area. Since Video 44 has more extensive media interests and since those interests include television stations, whereas the interests of Monroe's principals are limited to radio facilities, Monroe is entitled to a moderate diversification preference.

Integration of Ownership and Management

91. Three of Monroe's principals propose to be integrated in the

[26] Video 44 concedes that Monroe is entitled to a preference in each of these categories (See Conclusion 164 and 173).

day-to-day operation of the station. Mr. Haag (36%) will serve as managing director and will devote 35 hours each week;[27] Mr. Velasquez (10%) will serve part-time (25 hours) as Monroe's liason with the Hispanic community and is also proposed to be involved in decisions regarding Spanish programming and the sales activities of the station; and Mr. Hill (2%) will serve full-time as the Sports Director and a salesman for Monroe's proposed station. The Presiding Judge agrees with Video 44 that he cannot obtain integration credit for the time to be consumed as a salesman since he will not exercise managerial responsibilities in this capacity. Mr. Hill's proposal is, therefore, reduced from one constituting full-time integration to that of a substantial time commitment for comparative purposes. Monroe will be credited with 38% substantial and 10% part-time quantitative integration credit. This integration is enhanced by the fact that all three persons are long-time local residents active in the community life of Chicago. This integration is further enhanced by the fact that Mr. Velasquez (Hispanic) and Mr. Hill (black) are members of minority groups. Video 44 receives no integration credit since none of is principals propose to devote a minimum of 20 hours per week to the station. *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 1495 (Rev. Bd. 1979), *review denied*, FCC 79-397 (June 21, 1979). Video 44 and Monroe receive slight residual merit since two of Video 44's principals, and three of Monroe's principals reside and are active in local civic affairs and propose to devote a period of time to the station's affairs. *Midwest, supra.* On the basis of the foregoing analysis, Monroe warrants a moderate preference.[28]

92. In summary, Monroe enjoys diversification and integration preferences over Video 44. It is therefore concluded that the public interest is better served by a grant of Monroe's application.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Monroe Communications Corpora-

[27] Mr. Haag's proposal falls short of that which would consitute full-time participation but is characterized as a "substantial" commitment for integration purposes. *Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018 (Rev. Bd. 1981).

[28] Mr. Velasquez is a 45% shareholder of CID Broadcasting, Inc., applicant for a new AM station in Chicago. He hlas represented that he will withdraw from Monroe in the event that application is granted. Even assuming Mr. Velasquez's interest in Monroe is discounted, Monroe would still warrant an integration preference over Video 44.

tion for a construction permit IS GRANTED subject to the following conditions:

> Wayne J. Fickinger shall divest himself of his limited partnership interests in Cablevision Programming Investment and Chicago Cablevision Investments prior to the commencement of operation.
>
> In the event that the CID Broadcasting, Inc. application (BP-810105AE) for a new AM station in Chicago is granted, prior to the commencement of operation of that radio station, Arthur R. Velasquez shall certify to the Commission that he has divested himself of all interest in, and connection with, Monroe Communications Corporation.
>
> Operation with maximum effective radiated power in excess of 1000 kilowatts shall not commence absent Canadian consent.

and the application of Harriscope of Chicago, Inc., Essaness Theatres Corporation and National Subscription Television of Chicago, Inc., a Joint Venture d/b/a Video 44 for renewal of its license to operate station WSNS-TV IS DENIED.[29]

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH CHACHKIN, *Administrative Law Judge*

[29] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Ownership and Management, Integration of
Reconsideration

Review Board denied reconsideration of diminished ownership integration credit in comparative b/c case where applicant's 12 words of record evidence concerning proposed managerial role of its 100% owner lacked a job description or even a job title.

—*Voce Intersectario Verdad America, Inc.*

MM Docket No. 83-765

FCC 85R-72

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re applications of	
Voce Intersectario Verdad America, Inc. Las Vegas, Nevada	MM Docket No. 83-765 File No. BPH-811009AH
Jadonn Communications, Inc. Las Vegas, Nevada	MM Docket No. 83-766 File No. BPH-811022AM
Lorraine Walker Arms Las Vegas, Nevada	MM Docket No. 83-767 File No. BPH-820521AL
William H. Hernstadt Winchester Township, Nevada	MM Docket No. 83-768 File No. BPH-820524W

MEMORANDUM OPINION AND ORDER

Adopted: August 28, 1985; Released: September 5, 1985.

BY THE REVIEW BOARD: BOARD MEMBER BLUMENTHAL CONCURRING IN THE RESULT AND ISSUING A STATEMENT.

1. The Review Board has under consideration a petition for reconsideration filed July 1, 1985 by Lorraine Walker Arms (Arms), one of three losing applicants in the captioned proceeding. In our *Decision*, 58 RR 2d 445 (1985), we granted the application of JaDonn Communications, Inc. (JaDonn) as comparatively superior to Arms, Voce Intersectario Verdad America, Inc. (Voce), and William H. Hernstadt (Hernstadt). Voce and Hernstadt have joined JaDonn in opposing Arms' petition.

2. Arms finished second in the comparative evaluation essentially because her 100% ownership integration proposal received only "slight credit," due to its vagueness and paucity, 58 RR 2d at 450–51, while JaDonn received full credit for its 100% proposal, *id.* at 451–52. In addition, the Board noted that even if the JaDonn and Arms integration proposals were quantitatively equal, JaDonn's was qualitatively superior. *Id.* at 451 and n. 8. Arms now argues that her direct case proposal to "devote full time to the operation and management of the proposed station" (Arms Exh. 2, p. 3) contained only an "inadvertent change in the language used" and "mere semantic differences" (Recon. petition at 3, 5) compared to her 20-month-earlier statement that she would be "100% Owner and General Manager" (Question 27 of Arms' FCC Form 301 application), and that the two statements are consistent and supported by "extrinsic evidence" that she always intended to be the station's full-time general manager. Alternatively, Arms asserts that if she had changed her management proposal, an amendment to her application would have been required by Section 1.65 of the Commission's Rules, 47 CFR 1.65; hence, according to Arms, the Board made the implicit finding that she violated that rule, and remand is required because there was no Section 1.65 violation issue or hearing. Finally, Arms complains about the allegedly disparate treatment accorded questions concerning JaDonn's integration proposal.

3. We reject Arms' latest attempt to legitimize her clearly inadequate integration proposal. Our judgment herein derives not from semantics or lack of evenhandedness but from grave concern that ownership integration proposals, which, as here, may be the key to a broadcast license grant, must not be reduced to the

empty exchange of "buzz words" which Arms purports to decry. The *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901, 1909-10 (1965), unmistakably focuses on the managerial nature, policy function, and time duration of ownership integration commitments. Special weight is accorded to certain staff positions, such as general manager, *id.*, but the Commission has made clear that primary attention is paid to job content, not mere titles, *e.g.*, *Minority Broadcasters of East St. Louis, Inc.*, 99 FCC 2d 264, 55 RR 2d 275 (Rev. Bd. 1984), *rev. denied*, FCC 85-131 (Comm'n 1985); *Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 55 RR 2d 1299 (Rev. Bd. 1984), *rev. denied*, FCC 85-275 (Comm'n 1985). Concern has also been expressed about vague time commitments that lack specificity of hours, and in *Vacationaland*, *supra*, the Board announced that, henceforth, unspecific commitments (such as "full time") would not be fully credited.

4. Judged by these standards, neither of Arms' two integration statements is complete. The application's five-word statement contains no time commitment, and the twelve-word direct case lacks a specific job description or even a job title. Taken together, the 17 words might be technically sufficient (the *Vacationland* specific time requirement had not been announced prior to the instant hearing)—although far from a model of what the *Policy Statement* of case precedents envision as a comprehensive ownership integration proposal—but we are not at liberty to combine the statements. For, as pointed out by Voce in its opposition to Arms' reconsideration petition, under the procedural rules established in the instant case the applicants' integration proposals were not deemed frozen for comparative purposes until their direct cases were filed. *See* Tr. 4; Order, FCC 83M-3852, released October 26, 1983; *Metro Broadcasting, Inc.*, 99 FCC 2d 688, 701-02 nn. 8 & 9, 57 RR 2d 440, 450-51 nn. 8 & 9 (Rev. Bd. 1984). The fact that Arms used an outdated application form containing Question 27 was fortuitous; a revised form, *sans* Question 27, had been adopted in October 1981 and became available on April 27, 1982, FCC Public Notice, Mimeo 3565 (April 27, 1982), and at least one applicant here—Hernstadt—used it. Moreover, on February 17, 1982, the Commission issued a public notice absolving any user of the outdated form from answering Question 27. *Interim Guidelines for Submission of FCC Form 301*, 50 RR 2d 1416 (1982). Thus, no one was on notice that any significance would ultimately attach to Arms' first (five-word) integration statment, which was strictly optional. Under these

circumstances and for the additional reasons cited in our *Decision*, *supra*, 58 RR 2d at 451 n. 6, taking official notice of Arms' Question 27 integration statement is not appropriate. While we have permitted an applicant to amplify a pre-cutoff date unspecific Question 27 integration statement ("Ron Grantham/Applicant/Full-time") with a later precise managerial proposal (full-time general manager) without calling it impermissible comparative upgrading, *Leflore-Dixie, Inc.*, 57 RR 2D 1155, 1157-59 (Rev. Bd. 1985), we cannot endorse Arms' attempt to do the exact opposite and hold that a later final integration statement which is general should be read together with (or "superseded" by) an earlier more specific one. Arms is bound by its latest-in-time integration proposal, which has been found wanting in critical detail, and, particularly where the pickings are so slim, its plea of inadvertent ommission cannot be honored.

5. Arms' renewed attack on JaDonn's integration proposal is merely a rehash of arguments amply treated in the *Decision*, *supra*. We deny its claim of disparate treatment. As in *Leflore-Dixie, Inc., supra*, the instant case involves significant questions about several applicants' integration proposals. The fact that some of these questions were resolved favorably to the applicants and others were not does not signify disparate treatment, only differences in the merits of the contentions and the relevant modes of analysis. *Id.* JaDonn's proposal was fully tested on cross-examination, and the Board was required to determine whether the proposal withstood that assault. We concluded that it had, and that JaDonn had set forth with sufficient detail a full-time managerial integration proposal. On the other hand, Arms' integration proposal was not subjected to cross-examination or otherwise elaborated at hearing. Only its basic adequacy was at issue, and Arms failed to demonstrate that her 12 words of record evidence were legally sufficient for full credit.[1]

6. Finally, Arms' discovery of an implicit Section 1.65 rule violation "conviction" in the *Decision's* integration proposal discussion is chimerical, and no remand is required to explore this non-issue. The only question treated was whether Arms had set forth an adequate integration proposal in her direct case, not whether Arms should also be faulted under Section 1.65 for

[1] We reiterate our view that the presumption in *Deep South Radio, Inc.*, 46 RR 2d 1657 (1980), of some managerial duties with corresponding slight credit for majority stockholders encourages applicants like Arms to put forth inadequate integration proposals which do not meet their burdens of proof. It would be preferable to base the award of all credit on specific evidence rather than inferences. See *Decision, supra*, 58 RR 2d at 451 n. 7.

apparently receding from an earlier more specific integration proposal without appropriately amending her application. In any event, exoneration on a Section 1.65 issue would not make Arms' direct case integration statement adequate, even if it proved that Arms never *intended* to modify her integration proposal. What counts is the record evidence—Arms' direct case—not her unarticulated intent. Arms' opponents had a right to rely on the literal wording of her final integration statment, absent some further explanation which Arms did not provide, and that integration statement did not specify a managerial role for Arms.[2]

7. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed by Lorraine Walker Arms on July 1, 1985 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

Concurring Statement
Of
Board Member Norman B. Blumenthal

Solely because petitioner here has not met the legal threshold for reconsideration, I concur in the result.

However, as indicated in my dissent to our decision (*see Decision*, 58 RR 2d 445 at 452), I disagree with the majority's treatment of the integration proposal of Lorraine Walker Arms, both in the decision and, again, herein.

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[2] Moreover, we again note that even if Arms' integration proposal were fully credited, JaDonn would still win. See *Decision*, *supra*, 58 RR 2d at 451 and n. 8. This is especially true under *James U. Steele* v. *FCC*, Case No. 84-1176 (D.C. Cir. August 23, 1985), which declared the Commission's female qualitative enhancement policy invalid. As Arms recognizes in its reconsideration petition, there is no Commission precedent supporting qualitative enhancement credit for her non-Las Vegas and non-service area civic activity, and we decline to accord any such credit. *See Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1262-63 and n. 10, 52 RR 2d 1063, 1065-66 and n. 10 (1982), *aff'd sub nom. West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601 (D.C. Cir. 1984).

Cellular Commications Systems
Common Carrier, Mobile Radio
Fixed Radio Services
Rulemaking, Petition for, Denied

Commission denied Petition for Rulemaking to authorize wireline cellular carriers in area other than Metropolitan Statistical Areas to provide cellular service to fixed as well as mobile customers. Fixed cellular service is currently permitted to be offered by all cellular licensees in their licensed areas as an incidental service pursuant to Section 22.308 of the Rules. —*Westcom Products, Inc.*

FCC 85-291

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Subpart K, Part 22 of the Commission's Rules, to facilitate the development of cellular radio telecommunications service in the rural areas of the country.	RM-4882

MEMORANDUM OPINION AND ORDER

Adopted May 31, 1985; Released June 21, 1985

BY THE COMMISSION: COMMISSIONER RIVERA NOT PARTICIPATING.

I. Introduction

1. Westcom Products, Inc. (Westcom) has petitioned the Commission to amend Section 22.911 of our Rules to authorize wireline cellular carriers in areas other than Metropolitan Statistical Areas (MSAs) to provide cellular service to fixed as well as mobile customers.[1] Westcom has requested further that we begin

[1] Westcom would amend the Rules as follows (underlining identifies proposed new language):

accepting applications for cellular service in non-MSA areas from both wirelined non-wireline applicants "at an early date" without waiting until cellular applications for the remaining MSAs have been filed. Westcom additionally has proposed that we process these rural area applications according to the notice and cut-off procedures prescribed in Part 22 of the Rules rather than according to the special procedures that we have been utilizing for cellular applications. By supplemental petition, Westcom has asked us also to change Section 2.106 of the Rules to reflect the permissible use of the cellular frequency bands[2] in non-MSA areas for "fixed" as well as land mobile purposes. Westcom has specifically excluded non-wireline cellular licensees from its petition, expressing concern that proposing to allow them to offer fixed cellular sevice would be viewed as asking that we authorize a competitive local exchange telephone service and that the resulting protest would complicate and delay resolution of Westcom's "relatively simply petition."

2. Westcom states that it offers these amendments both to clarify existing policy and to promote the development of cellular systems in rural America by allowing telephone companies the option of using cellular technology to provide basic telephone service. Westcom projects that many non-MSA areas will not offer a sufficient subscriber base to support a cellular system without the additional customers who would be attracted as fixed cellular users. Thus, Westcom contends that the dual goals of establishing a nationwide, compatible cellular system and ensuring universal telephone service would be furthered by granting its petition. Westcom's petition has prompted over thirty comments by nearly sixty parties as well as six reply comments, including one by Westcom. All comments, whether or not specifically discussed in this text, have been evaluated in arriving at our conclusions.

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§22.911 Permissible communications

(a) * * * *

(b) Base stations in this service are authorized to communicate with associated subscribers; base stations must also render service to properly licensed roamers. Service maybe rendered to mobile stations on board vessels. *Additionally, in areas outside established Metropolitan Statistical Areas (MSAs), base stations in cellular systems licensed to wireline carriers may communicate with subscriber stations at fixed locations and subscriber stations at fixed locations may communicate with and through base stations.*

[2] 825-845 MHz and 870-890 MHz.

II. Permissibility of Fixed Cellular Service

3. As an initial matter, there is disagreement among the commenting parties over whether the Rules currently prohibit communications between a cellular base station and a fixed point. While NewVector Communications, Inc. agrees with Westcom that a rule change would be necessary for fixed cellular services, Metro Mobile CTS, Inc. points out that it does not make sense to differentiate between fixed and mobile cellular stations when the simple addition of a battery pack enables a vehicular unit to operate at a fixed location.

4. While the use of cellular radio as a fixed service is not explicitly permitted by our Rules, neither is it explicitly prohibited. In a recent rulemaking, we discussed with approval using cellular technology to provide basic telephone service. In our *Cellular Lottery Rulemaking*, 98 FCC 2d 175, 194-95 (1984), *recon.*, FCC 85-117, released May 3, 1985, we stated that "[c]ellular service is a local exchange radio service under Sections 2(b) and 221(b) of the Communications Act of 1934, which is a natural extension of local exchange landline service," and we suggested that cellular communication "may over time, supplant landline local exchange service in some areas". We further observed that:

> [M]any of the small independent telephone companies project that cellular service will prove to be a cost effective means of providing basic telephone exchange service in remote areas where the cost of providing landline service is high. These rural telepone companies should not be precluded from using cellular technology to provide basic telephone service. . . .[I]f rural telephone companies are precluded from providing cellular service, they may lose their landline subscribers to the cellular carriers. Ultimately, this diversion may cause rural companies to lose revenues, and inhibit their ability to provide local exchange landline service at affordable rates so that many individuals maybe forced to forego telephone service.

5. Through our recent revision of Part 22[3] we have enabled licensees in the Public Mobile Services, including the Domestic Public Cellular Radio Telecommunications Services, to implement "incidental" services such as service to fixed units without an explicit prescriptive rule. Section 22.308[4] allows licensees to offer

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[3] Public Mobile Radio Service, CC Docket No. 80-57, 95 FCC 2d 769, 816-19 (1983).

[4] § 22.308 Incidental communications services. —(a) Licensees authorized to operate in these radio services may also use their facilities to provide other communcations services incidental to those specified in the authorization, provided that:

as incidental, communication services not incompatible with their licensed mobile operations. It was our intention in adopting this rule to give licensees in the common carrier mobile service the flexibility to offer services for which there is a marketplace demand, which may not have been specifically provided for in the Rules. We cited as examples the provision of weather information, stock quotations, and service to vessels. 95 FCC 2d at 816, 819. We therefore see no need for a rulemaking procedure when fixed cellular service may be implemented under existing Rules. So long as the requirments of Section 22.308 are met, cellular licensees may offer fixed cellular service,[5] in rural areas or elsewhere.[6]

III. Fixed Cellular Service Licensees

6. The issue drawing the greatest comment is whether fixed cellular service should be provided only by wireline carriers, as suggested by the Westcom petition. Predictably, a commenter's status as a wireline or a non-wireline carrier seems to have determined its response to this suggestion. Clinton County Cellular, Inc., *et al.* in supporting Westcom's wireline limitation, suggests that non-wireline carriers, who unlike wireline local

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(1) the incidental service does not interfere with the public mobile radio service specified in the authorization;

(2) the costs or charges of subscribers who do not wish to use the other communication service are not increased;

(3) the quality of service does not materially deteriorate, and neither growth nor availability of the licensee's authorized service is diminished beyond a minimal degree;

(4) the provision of the incidental service does not violate and is not otherwise inconsistent with other Commission rules, regulations, and policies; and

(5) the Commission is notified by letter prior to the provision of any incidental communication service. Such notification shall include a general description of the service and an explanation of the technical proposal.

[5] With regard to the provision of service to fixed rural subscriber stations by carriers in the Public Land Mobile Service (non-cellular), for which specific provision is made in Section 22.509(b), we indicated that such service would not be considered "incidental," but would be governed instead by the specific rules set forth for rural radio service. 95 FCC 2d at 819. In so stating, it was not our intention to restrict cellular licensees from providing incidental service to rural fixed subscribers but rather to make clear that licensees providing rural radio service pursuant to Subpart H of Part 22 of our Rules would be able to include their rural subscribers when calculating channel occupancy for purposes of Sections 22.516 and 22.16. In the cellular radio service, no channel loading requirements exist.

[6] Because of cellular systems' capacity limitations and the ready availability of landline services, we do not expect carriers in heavily populated areas to provide fixed cellular service except in relatively unusual circumstances.

exchange carriers do not already have a substantial investment in and commitment to non-MSA communities, may find that the capital costs of constructing a stand-alone rural cellular system make fixed cellular an unattractive proposition. The Blair Telephone Company, *et al.*, The Rural Electrification Administration, Southwestern Bell Telephone Company, and United States Telephone Association all suggest a further limitation, that only franchised local wireline exchange telephone companies be able to provide fixed cellular service. They contend that any other scheme will promote bypass of the local exchange network to the economic detriment of the exchange companies and their subscribers. Westcom, in its reply comments, agrees with this additional limitation. Clinton County Cellular, Inc., *et al.*, Concord Telephone Company, *et al.*, and Mobile Communications Corporation of America all suggest that the Commission defer to the authority of the states to give exclusive franchises for the provision of exchange telephone service.

7. Non-wireline carriers, and organizations representing them, oppose Westcom's petition to exclude them from the fixed cellular market. LIN Broadcasting Corporation contends that limiting fixed cellular to wireline carriers in remote areas would severely impede the ability of non-wireline carriers to compete in non-MSA areas. Furthermore, handicapping non-wirelines in those rural areas encompassing portions of the interstate highway system or lying adjacent to larger, defined markets, could prove detrimental to the survival of non-wireline cellular licensees in MSA areas, where operators would be able to offer service in a more extended area and would profit from greater economies of scale. McCaw Cellular Communications, Inc. dismisses Westcom's central rationale for limiting the new service to wirelines — that its proposal would be interpreted as requesting the authorization of a competitive local exchange service — as irreconcilable wilth existing Commission policy. McCaw points out that Subpart H of Part 22 of our Rules already provides for a Rural Radio Service in which subscribers at fixed locations communicate with the base stations of either radio common carriers or wireline companies. McCaw argues that this competition between non-wireline and wireline companies has had no adverse impact on service to the public and that Westcom has not offered any indication that a contrary result would occur with fixed cellular.

8. Able Communications, Metro Mobile CTS, Inc., and the Cellular Telecommunications Division of Telocator Newwork, Inc. all express concern that where the local exchange wireline

telephone company is providing fixed cellular service as an extension of its local landline operation there is a danger that the wireline company will gain an anticompetitive advantage over the non-wireline carrier by being able to cross-subsidize between monopoly and competitive services. Metro Mobile comments that the regulatory framework for cellular telecommunications — *i.e.*, our resale, interconnection, and headstart policies — contemplates a competitive duopoly market structure involving one wireline and one non-wireline cellular system. Metro Mobile also points out that Westcom's petition does not address the fact that cellular license areas are not defined by landline telephone franchise areas and further that the local franchised landline company often is not the wireline cellular service licensee, or is only a minority partner in the cellular licensee, within the franchise area. Metro Mobile argues further that allowing only wireline companies to offer fixed cellular service will not make sense once the wireline/non-wireline fence is removed and non-wireline entities can acquire control of wireline cellular systems. Finally, Metro Mobile contends that Westcom's fears that a proposal including non-wireline companies would be received as one for a competitive local exchange service are misplaced, since we have already stated that cellular service *is* local exchange radio service.[7]

9. Telephone and Data Systems, Inc. (TDA), urging caution in the handling of Westcom's petition, expresses its concern over the harmful competitive impact that the provision of cellular service as basic telephone service would have on local exchange carriers in areas where they are not affiliated with the wireline cellular licensees. Pacific Bell gives specific examples of how providing cellular service to fixed locations could reduce its costs by millions of dollars in the first few years of operation and comments that the former Bell Operating Companies (BOCs) should have the option of offering fixed cellular to provide basic telephone service in remote areas without the necessity of going through a separate subsidiary and having to secure amendment or waiver of Section 22.901(b) of the Rules. Southwestern Bell Telephone Company underscores Pacific Bell's concerns, explaining that the BOCs do not advocate being permitted to provide mobile cellular service but instead seek to improve their service of basic telephone customers.

10. Section 22.308, and thus the oppotunity to provide fixed cellular as an incidental service, is available to Part 22 cellular

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[7] Cellular Lottery Rulemaking, *supra*.

licensees, both wireline and non-wireline. As long as a cellular radio licensee can offer fixed cellular service without damaging, diminishing, or otherwise interfering with its licensed cellular service and without increasing the cost to its mobile subscribers not using the fixed service, it will be permitted to offer fixed cellular as an incidental service.[8] Further, the authority to provide incidental service is included within the original cellular radio license, and accordingly, no state authorization is required in order to provide fixed cellular service beyond that needed for beginning cellular operations.[9]

11. We have not been given sufficient justification to prevent non-wireline carriers from participating in this aspect of cellular service, particularly when excluding them could undermine the competitive cellular structure that much of our policy has been designed to foster. As Metro Mobile correctly points out, cellular service is local exchange service in which non-wireless providers currently participate on an equal basis with their wireline counterparts. Local exchange wireline carriers may augment their provision of basic exchange communications with fixed cellular service if they choose, provided that they first become cellular licensees; and by retaining our separate wireline allocation, we are giving wireline carriers sufficient opportunity to obtain cellular licenses.[10]

12. The divested BOCs wishing to offer fixed cellular service may do so, but only pursuant to Sections 22.308 and 22.901 of the Rules. The sections together require that these companies offer fixed cellular service only through separate corporate subsidiaries licensed to provide mobile cellular service. The regulatory scheme requiring that BOCs offer cellular services only through separate subsidiaries has been carefully developed. We are not

[8] Of course, the licensee may not violate, nor operate in a manner inconsistent with, Commission Rules and policies; and pursuant to Section 22.308(a)(5), the licensee must provide us with advance notice of its intention to provide fixed cellular service. The licensee need not specify each fixed location and need not submit notification each time a fixed subscriber is added.

[9] Cellular Communications Systems, 86 FCC 2d 469, 505 (1981), *reconsideration*, 89 FCC 2d 58, 94-96 (1982). The regulation of rates of course, is left to the states. Moreover, it should be emphasized, as noted in paragraph 16, *infra*, that fixed cellular service is likely to occur almost exclusively in rural areas. In more populous areas, exchange telephone service can almost always be provided more economically by landlines. Therefore, for the most part, we do not anticipate that provision of fixed cellular service as an incidental service will affect state regulated local exchange services and rates.

[10] One of the primary reasons for retaining the set-aside when we adopted lottery rules was to permit telephone companies to use cellular technology in providing basic service. 98 FCC 2d at 194-95. *See* para. 4, *supra*.

here going to consider modifying or waiving this regulatory regime. Further, the requirements of Section 22.308(a)(2) ensure that fixed service will not be cross-subsidized from cellular mobile revenues. While cellular technology may provide a less expensive alternative to landline in providing basic telephone service in a few instances,[11] cellular radio was not intended as a wholesale substitute for basic landline communication.[12]

IV. Technical Requirements for Fixed Cellular Service

13. Several commenters discuss the technical requirements for providing fixed cellular service. International Mobile Machines Corporation and M/A-COM, Inc. each suggests that those of our technical standards designed to ensure compatibility among mobile cellular systems, *e.g.*, those regarding limited power, antenna height, and cell hand-off, are unnecessarily restrictive for fixed cellular services and should be eliminated. Pactel Mobile Access, on the other hand, urges that all existing cellular coordination rules, particularly the Section 22.15(b)(2) requirement of interference studies, be maintained. TDS recommends that cellular base stations providing fixed service conduct a field trial at increased effective radiated powers in order to determine whether it is possible to provide basic telephone service via cellular radio of at least equivalent qualilty to that of landline. Mobile Satellite Corporation (MOBILESAT) objects to this suggestion, however, concerned that it could increase the chances of interference not just with co-channel cellular licensees but also with users of the adjacent spectrum. MOBILESAT also argues that fixed service should be provided only on a secondary non-interference basis; whereas, International Mobile Machines contends that fixed cellullar should be treated on an equal basis with mobile service.

14. Ancillary fixed cellular service is authorized under the original cellular license of the carrier subject to the requirements of Section 22.308. It is therefore incumbent upon the carrier to determine that its fixed cellular operations do not cause interference either to its own mobile units or to the mobile units of any

[11] *See* para. 4, supra.

[12] Spectrum was allocated for mobile communications upon a finding of a substantial need for service, and the particular frequency band was selected because of its suitability for mobile communications. We will not revisit herein this allocation to provide for the establishment of dedicated fixed systems. The staff is currently exploring the possibility of employing underutilized cellular spectrum for the provision of basic telephone service, and a formal proceeding will be initiated regarding this possibility in the near future.

other system. All interference studies presently mandated under the Rules will continue to be required. As usual, a carrier must coordinate with adjacent cellular systems regarding an interference extending beyond its authorized service area. Within these bounds, a licensee may, at its discretion, conduct its fixed cellular operations at any level of power authorized for its mobile operations. *See* §22.904.[13] Cellular units designed to be used exclusively for fixed cellular service need not have the ability to hand-off between cells or to roam, in view of the fact that a fixed unit will never move from cell to cell or system to system.[14] Licensees should caution their customers using any radio service regarding the potential lack of privacy,[15] and carriers may wish to investigate installing encryption devices in order to preserve the integrity of fixed cellular communications.[16] Following these guidelines, equipment manufacturers may submit their equipment to the Office of Science and Technology for equipment authorization, pursuant to Part 2 of the Rules.

V. Geographic Markets for Fixed Cellular Service

15. Westcom has asked us to permit fixed cellular service only in rural areas, which Westcom defines as areas outside established MSAs. Westcom's emphasis on rural areas stems from its conviction that the potential subscriber based for a mobile cellular system in such areas is probably too small to support such a system without the additional customers who would be attracted by the promise of fixed cellular service and that telephone companies serving rural areas would be more likely to build cellular systems where they could utilize cellular technology to reduce their cost in providing basic telephone service. In its reply comments, Westcom explains further that it has limited its

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[13] Carriers should consult Part 17 of the Rules regarding the need for FAA clearance for the installation of antennas substantially higher than the height of an existing structure.

[14] Units without handoff or roaming capability will not be permitted to operate as mobiles, however, because of their incompatibility with cellular systems generally.

[15] It is not our intention to imply that a cellular subscriber lacks a reasonable expectation of privacy merely because the airwaves are used. Cellular service is not intended to be received by the general public, but is rather intended as a means for the provision of private channels of telephone communication to subscribers. Nevertheless, there are devices available on the market that scan cellular channels; customers should be aware of their existence.

[16] Those researchers, manufacturers, and carriers interested in employing digital technology for the provision of fixed service may consider Digital Termination Systems (DTS) authorized under Digital Electronic Message Services (DEMS) in Part 21 of the Rules.

proposal to non-MSA areas where there is little, if any, question as to whether the cellular frequency allocation can accommodate both mobile and fixed radiotelephone requirements.

16. Several commenters support Westcom's proposed limitation, although both Pacific Bell and PacTel Mobile Access suggest that there are rural areas within MSAs that could greatly benefit from the implementation of fixed cellular service. Pacific Bell points out that if the decision of where to install fixed cellular systems is left to the telephone companies, the companies will select only remote rural areas, since only there would cellular technology be less expensive than wireless cables. No commenter opposes the idea of restricting fixed cellular service to rural areas. Indeed, in *Cellular Lottery Rulemaking, supra*, we discussed with approval the concept of the utilization of cellular radio by rural telephone companies to provide basic telephone service. Like Pacific Bell, however, we see no need to limit this new cellular service to non-MSA areas. As Pacific Bell points out, economics alone may well relegate fixed cellular to less populous areas. Furthermore, a licensee seeking to offer fixed service will be permitted to do so only while complying with the requirements of Section 22.308. Compliance will require both rural and urban licensees to ensure that there is no degradation of their current or potential level of mobile cellular service, thereby assuring that the cellular frequency allocation can accommodate the needs of their mobile customers as well as it could without fixed cellular service. Consequently, we shall allow the provision of fixed cellular service in all areas where mobile cellular service is permitted.[17]

VI. Licensing of Fixed Cellular Service

17. Westcom's proposal that application for fixed cellular service be accepted without delay and pursuant to the traditional Part 22 notice and cut-off procedures has drawn a response from most commenters, with the opinions on this issue evenly divided. New York Independent Cellular Systems, Inc., *et al.* (New York) filed a representative response in favor of an early filing date, arguing that non-MSA filings are likely to be small, thus minimizing the adminstrative burden on our staff and any resulting delay. New York suggests further that in a setting with

[17] There is outstanding a rulemaking proceeding in General Docket No. 84-1231 in which we are considering allocation additional spectrum for cellular service. Any parties believing that provision of fixed services will affect the amount of spectrum needed for cellular in the future should make their views known in that docket.

few prospective applicants, the Section 22.31 notice and cut-off procedures would prove more efficient than our cellular procedures by discouraging lottery ticket applications while encouraging settlements. On the other hand, Clinton County Cellular, Inc., *et al.*, which supportive of the accelerated filing of rural applications, contends that reverting to the traditional Part 22 filing procedures could provoke a "procedural morass."

18. GTE Mobilnet Incorporated, an advocate of fixed rural cellular, opposes the concept of an early filing date for such applications. GTE argues that in order for cellular service to grow in an expeditious, economical, and orderly fashion, it should proceed from heavily to lightly populated areas, so that growth will occur as an "extension of existing cellular coverage along highway corridors between heavily populated urban areas rather than by the rapid creation of questionably viable spot networks in rural areas." TDS, similarly urging retention of current cellular procedures, points to Commission staff delays in processing cellular applications and suggests that MSAs should be licensed before non-MSA areas, since rural fixed cellular may only prove viable where the applicant already has a cellular license in a continguous area.

19. While we are aware that fixed cellular radio will likely prove more of a boon to rural subscribers than to urban customers, we have not been presented with sufficient justification for deviating from our current procedures. We note initially that fixed cellular operations will only be incidental to licensed mobile cellular operations. The primary question of accelerated filing deadlines has already been considered in depth by this Commission. *Cellular Lottery Rulemaking*, 98 FCC 2d at 205-09, *recon.*, FCC 85-117 at paras. 35-36. We have also already considered at length the secondary question of application procedures for smaller cellular markets and have opted for the special cellular procedures we employ in larger markets.[18] *Id.* at 28. For neither issue are we prepared to alter the methods we have carefully selected and implemented. Because of constraints on our ability to process cellular applications, we cannot make provisions for every possible siltuation and still maintain an orderly, expeditious processing system for the vast majority of the country. *Id.* at 30.[19]

[18] For those areas, whether MSA/NECMA or not, for which no applications are received on the filing date, we shall use regular notice and cut-off procedures instead of a date certain filing deadline. Cellular Lottery Rulemaking, 98 FCC 2d at 205.

[19] We remain sensitive to the fact that there is current demand for cellular service in many non-MSA areas, particularly those situated geographically between

VII. Conclusion

20. We agree that fixed cellular service may offer an attractive alternative to basic landline telephone service in some rural areas. We do not find, however, that the rulemaking requested in Westcom's petition is necessary when fixed cellular can be accommodated under existing Commission Rules. By offering fixed cellular as an incidental service to traditional mobile cellular, qualified licensees may provide the service where it is truly needed according to a carefully planned regulatory scheme.

21. Accordingly, IT IS ORDERED that the Petition for Rule Making filed by Westcom, RM 4882, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

*Appendix-may be seen in FCC's Dockets Branch, 1919 M. Street, N.W., Washing., D.C.

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urban areas with a community of interest. No person has yet come forward with an acceptable method of processing cellular applications that would work more fairly or easily than our approach of accepting applications in declining order of market size. We shall give complete and careful consideration to any alternative plan set forth in a petition for rulemaking including plans for the provision of exchange service.

Common Carrier, Depreciation Rates, Prescription of

This order will prescribe depreciation rates and write-downs of net investment for Western Union's customer premises equipment.
—*Western Union Telegraph Co.*

FCC 85-51

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the matter of

The Prescription of Revised Percentages of Depreciation pursuant to the Communications Act of 1934, as amended for:

The Western Union Telegraph Company

ORDER

Adopted: January 30, 1985Released: February 4, 1985

BY THE COMMISSION

1. The Communications Act of 1934, as amended, grants the Commission the authority to prescribe depreciation rates and accounting for carriers and to revise these presciptions when it deems necessary. By this order we prescribe revised depreciation rates for Western Union Telegraph Company and a write-down of its net investment.

2. On August 14, 1984, Western Union submitted a proposal to revise the depreciation rates for three of its subaccounts and to write-down in 1984 a portion of two of these subaccounts by charging Account 4925, Extraordinary plant losses. This proposal was accompanied by supporting studies and data. Our staff reviewed these studies and data in detail and discussed them with representatives of Western Union. These discussions led to a tentative agreement regarding the life and salvage factors that should be used to determine Western Union's depreciation rates.

On November 16, 1984, Western Union filed a revised proposal with the Commission.

3. On December 12, 1984, our staff issued a Public Notice entitled, "Depreciation Rate Prescription Proposal for Western Union Telegraph Company," which solicited comments regarding the Western Union filing. No comments were received in response to this Public Notice.

4. Our staff reviewed Western Union's November 16, 1984, filing and found that the proposed rates are consistent with our staff's rate recommendations and were developed in accordance with the depreciation methods and rules specified in the Commission's final decision in *Property Depreciation*, Docket No. 20188, 83 FCC 2d 267 (1980), *reconsideration*, 87 FCC 2d 916 (1981). Our staff also determined that the amount which the Company proposes to write-down, i.e., approximately $71 million, is consistent with these same life and salvage factors. However, our staff found that the Company's proposal to write-down those amounts by a charge to Account 4925, Extraordinary plant loss, is inconsistent with our Rules. Our Rules[1] require that this account be used only when a loss occurs due to the retirement of plant. In this case, however, much of Western Union's loss is attributable to plant still in service. Our staff recommends that, instead of the Company's proposed account, the write-down should be accomplished by charging Account 6220, Delayed Income Charges (a below the line account), which applies to extraordinary and non-recurring delayed items.

5. Inasmuch as our staff has found Western Union's rate proposals and its proposed write-down amounts to be based upon realistic life and salvage factors, and the methods specified in our Rules regarding the accounting treatment to be used for their write-down, and we therefore require that Western Union effect this requested write-down of the Telex I and Telex II subaccounts by charging Account 6220.

6. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 201-205 and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201-205 and 220, That the percentage of depreciation and accounting treatment set forth in

[1] See §§ 35.49.25 and 35.04-4 of our Rules and Regulations.

the Appendix to this order are prescribed effective on the dates listed.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix

FEDERAL COMMUNICATIONS COMMISSION

Schedule of Annual Percentages of Depreciation for
The Western Union Telegraph Company

Effective January 1, 1985[1]

Account Number	*Class or Subclass of Plant*	*Average Remaining Life* yrs.	*Future Net Salvage* %	*Reserve Ratio* %	*Remaining Life Rate* %
1052.	Teleprinter Sta Eqpt				
.00	Private Wire Svc	3.8	3.0	−2.9	26.3
.27	Telex II[2]	2.5	3.0	57.3	15.9
.34	Telex I[2]	2.7	3.0	54.2	15.9

Common Carrier, Rates, Just and Reasonable Charges
Tariff, Investigation

Western Union Telegraph Co. granted reimbursement from a number of International Record Carriers (IRCs) for unauthorized discounts taken by the IRCs for Telex and TWX service.

—*Western Union Telegraph Co.*
CC Docket No. 78-97 (Phase 1)

FCC 85-463

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
The Western Union Telegraph Company	CC Docket No. 78-97 (Phase I)
Revisions to Tariff F.C.C. Nos. 240 and 258 filed with Transmittal No. 7436; Revisions to Tariff F.C.C. Nos. 268 and 269 filed with Transmittal Nos. 7347 and 7348; Revisions to Tariff F.C.C. Nos. 229, 240, 254, 255, 258, 260, 263, and 268 filed with Transmittal No. 7417	

MEMORANDUM OPINION AND ORDER

Adopted: August 9, 1985; Released: August 19, 1985

BY THE COMMISSION:

1. On November 28, 1983, the Western Union Telegraph Company (WU) filed a petition for reconsideration/clarification of the Commission's *Final Decision* in a docketed investigation of the lawfulness of WU's rate of return and rate structure for its

Telex/TWX service.[1] WU's petition charges that the international record carriers (IRCs)[2] improperly underpaid WU for Telex/TWX service between January 1978 and July 1979, and seeks reimbursement for the amounts improperly withheld. For reasons discussed below, the WU petition is granted in part.

I. BACKGROUND

2. A detailed description of Telex/TWX service and the procedural history of this docket is provided in the *Final Decision* and need not be repeated here. We shall, however, discuss the background of the issue that underlies WU's claim against the IRCs: whether the IRCs wrongfully withheld monies due WU for Telex/TWX service provided to the IRCs during the period in question.

3. WU first offered Telex service in 1961, and from that date until 1973, provided that service to the IRCs at the same rates it charged its public customers. In 1971, WU purchased the TWX system from American Telephone and Telegraph Company, Inc. (AT&T), and assumed the extant AT&T/IRC service contracts, which gave the IRCs a 27 percent discount off the public TWX rate. The TWX contracts expired in 1973, and when WU attempted to charge the IRCs the public rate for TWX serivce, "[t]the IRCs rufused to pay the full public tariff rates and attempts by WU to compel payment failed."[3] The conflict over TWX rates was resolved in 1975 and 1976 by a series of agreements between WU and each IRC. These settlement agreements effected a compromise that changed the rates for both TWX and Telex, providing both services to the IRCs at rates 5.5 percent below the respective public tariff rates. Two of the agreements stipulated that "the rates . . . reflect various cost and other factors which are necessary and sufficient to warrant a discount from the rates set forth in Western Union's public TWX and Telex tariffs."[4] These agreements expired by their own terms

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[1] The Western Union Telegraph Company, CC Docket No. 78-97 (Phase I), Final Decision, 95 FCC 2d 881 (1983) (*Final Decision*), *petition for review denied sub nom.* FTC Communications, Inc. v. F.C.C. 750 F.2d 226 (2d Cir. 1984).

[2] The IRCs are ITT World Communications Inc., TRT Telecommunications Corporation, Western Union International, Inc. and FTC Communications, Inc.

[3] FTC Communications Inc. v. F.C.C., No. 83-4217, at 4 (D.C. Cir., Dec. 17, 1984).

[4] The Western Union Telegraph Company, CC Docket No. 78-97, 68 FCC 2d 98 (*IRC Telex/TWX Order*), *reconsideration denied*, 69 FCC 2d 924 (1978), *petition for reconsideration dismissed sub nom.* Western Union International v. F.C.C., 652 F.2d 136 (D.C. Cir. 1980) citing Settlement Agreement of Western Union International, Inc. and WU, executed June 12, 1975, para. 5 and Settlement

on December 31, 1977.

4. On December 1, 1977, WU filed revisions to its public Telex and TWX tariffs proposing, *inter alia*, to increase the public rates for Telex/TWX service. On the following day, WU filed a proposed tariff that would establish rates for Telex/TWX service provided to the IRCs after the settlement agreements expired. This tariff proposed to eliminate the 5.5 percent IRC discount, and to charge the IRCs the full public rate. The proposed revisions to the tariffs setting public and IRC rates originally were scheduled to become effective on March 1, 1978 and March 24, 1978, respectively. WU subsequently deferred the effective date of the revised public Telex/TWX rates to March 10, 1978, and the IRC Telex/TWX rates to May 10, 1978.

5. The Commission expressed its concern over potential excessive profits and unlawful cross-subsidization in the proposed public Telex/TWX rates and rate structure, and suspended the proposed public tariff pending investigation in *The Western Union Telegraph Co.*, CC Docket No. 78-97, 67 FCC 2d 1420 (1978). Because the IRC Telex/TWX rates were premised on the public rates, the Docket 78-97 investigation was expanded to include WU's rates and rate structure for IRC-interconnected Telex/TWX service. *The Western Union Telegraph Co.*, CC Docket No. 78-97, 68 FCC 2d 98 (1978) (*IRC Telex/TWX Order*).

6. As we described in the *IRC Telex/TWX Order*, former Section 222(e) of the Communications Act of 1934 (the Act), 47 U.S.C. § 222(e), as drafted, required that we handle the IRC Telex/TWX rate issue in a complicated and unusual manner.[5] First, Section 222(e)(1) mandated that charges for outbound Telex/TWX service to the IRCs be established only through mutual agreement of WU and the IRCs,[6] or through a Commission prescription following a hearing. *IRC Telex/TWX order*, 69

Agreement of TRT Telecommunications Corp. and WU, executed October 15, 1975, para. 5.

[5] The version of Section 222 in effect during the period in question was repealed by the new Section 222, Part Two, of the Record Carrier Competition Act of 1981 (RCCA), P.L. 97-130, 95 Stat. 1687. Former Section 222, however, remains the applicable statute for purposes of deciding the instant case.

[6] [WU] shall distribute among the [IRCs], telegraph traffic by wire or radio destined to points without the continental United States, and divide the charges for such traffic, in accordance with such just, reasonable, and equitable formula in the public interest as the interested carriers shall agree upon and the Commission shall approve.

47 U.S.C. § 222(e)(1), cited and discussed in the *IRC Telex/TWX Order*, 68 FCC 2d at 118 n.32 and accompanying text.

FCC 2d at 118. Second, Section 222(e)(1), by limiting its purview to outbound Telex/TWX traffic, implicitly distinguished between inbound and outbound Telex/TWX traffic, even though such traffic employed identical facilities and involved the same parties. No language in the tariff required mutual agreement on rates for inbound Telex/TWX traffic. Stating that "we are constrained by this statutory language to reach an anomalous result which Congress could not have intended and evidently did not anticipate," *id.*, we suspended pending investigation WU's proposed rates for inbound Telex/TWX service to the IRCs and rejected the proposed outbound rates due to a lack of agreement between WU and the IRCs.

7. In the *IRC Telex/TWX Order*, we expressed our concern over the state of WU-IRC relations. Since expiration of the settlement agreements on December 31, 1977, the IRCs had rejected any attempt by WU to increase the Telex/TWX rates, and continued to pay the rates that had been effective under the settlement agreements. The IRCs had attempted to justify this practice byarguing that "Wu experiences certain cost economies in providing interconnected Telex and TWX services to the IRCs, as opposed to its public customers, and that WU should acknowledge these savings in the form of IRC charges which are discounted by a percentage from the public rates." *IRC Telex/TWX Order*, 68 FCC 2d at 122. The Commission determined that "we would serve the public interest by resolving once and for all this longstanding controversy over the existence of cost of service differences between public and IRC Telex/TWX services, which the IRCs maintain should be manifested in discounted IRC charges." *Id.* at 122 (footnote omitted).

8. On August 10, 1978, WU's tariffs for inbound IRC Telex/TWX service became effective, eliminating the discount established in the 1975 and 1976 settlement agreements, and charging the IRCs the full public rate. WU was subject to a Commission requirement, established in the *IRC Telex/TWX Order*, to keep accounting records of IRC payments in excess of the 1975-1976 settlement agreement rates. If the Docket 78-97 investigation concluded that the IRCs were entitled to a discount, WU would be ordered to refund the amount overpaid. Reacting to an increase in its costs, WU filed tariff revisions increasing its public Telex/TWX rates which became effective on October 1, 1978.

9. In January 1979, WU and the IRCs asked the Commission to accept a negotiated settlement of their continuing rate dispute.

The proposed settlement was premised on the public rates effective prior to the October 1, 1978 increase, and would have allowed the IRCs a substantial discount from the currently effective public Telex/TWX rate for both inbound and outbound service. By an order released April 20, 1979,[7] we rejected the proposed agreements on a number of grounds. First, we objected to the uprecedented size of the discount involved, and to the fact that the terms of the agreement allowed the possibility of an even greater discount in the future. Second, because 'WU uses virtually the same facilities to provide service to the IRCs and public domestic customers, there does not appear to be any justification . . . for significantly different rate treatment for these two classes of users."[8] Third, we objected to the departure from the traditional practice of basing IRC rates on the currently effective public rates. Finally, we found that the agreements were only a short-term palliative, and that given the history of continuous conflicts, resulting in the "withholding of payments by the IRCs in many cases,"[9] the public interest would be better served by a Commission rate prescription. We did, however, encourage WU and the IRCs to continue negotiations.

10 Following our rejection of the proposed agreements, WU and the IRCs informed the Administrative Law Judge (ALJ) assigned to the Docket 78-97 investigation that further negotiations had failed. On July 24, 1979, the ALJ prescribed interim rates for outbound Telex/TWX service to the IRCs, pending conclusion of the investigation.[10] The ALJ found no indication that an IRC discount was justified, and set the rates for outbound Telex/TWX service to IRCs at a level equal to the public rates. The ALJ also imposed an accounting order on WU in case the Docket 78-97 investigation should conlude that the IRCs were entitled to a discount from the prescribed rates.

11. With the ALJ's interim prescription of outbound rates, effective rates for all of WU's Telex/TWX service were established, and the rates charged the IRCs were, at least for the interim, set equal to those paid by the public for the same service.

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[7] The Western Union Telegraph Co., CC Docket No. 78-97, 71 FCC 2d 621 (1979).
[8] *Id.* at 629.
[9] *Id.* quoting the *IRC Telex/TWX Order*, 68 F.C.C. 2d at 122.
[10] Western Union Telegraph Co., CC Docket No. 78-97, Memorandum Opinion and Order Prescribing Interim Division of Charges for Outbound International Record Carrier Traffic, FCC 79M-845, released July 24, 1979, *review denied*, The Western Union Telegraph Co., CC Docket No. 78-97, FCC 79-812, released Dec. 13, 1979, *petition for review dismissed sub nom.* TRT Telecommunications, Inc. v. F.C.C., No. 79-2524 (D.C. Cir. Dec. 19, 1980).

No rates had been in effect for inbound Telex/TWX service to the IRCs between the date the settlement agreements expired and the date the WU inbound tariff went into effect (January 1, 1978 to August 10, 1978), and no outbound rates were in effect from January 1, 1978 until the ALJ's rate prescription of July 24, 1979. During those periods, the IRCs (with the apparent exception of FTC Communications, Inc.) continued to pay, despite WU's protests, the rates established for Telex/TWX service in the 1975-1976 settlement agreements, which included a 5.5 percent discount off the public rates in effect at that time.

12 On March 10, 1982, the second ALJ inolved in the Docket 78-97 investigation issued the *Initial Decision* in that Docket.[11] The ALJ determined, *inter alia*, that WU did realize significant cost savings in providing service to the IRCs, that the IRCs were entitled to a large discount off the public rate and that WU owed the IRCs a substantial refund for amounts overpaid in the past.

13. These findings, and virtually all the other findings in the *Initial Decision*, were reversed by the Commission in its *Final Decision* on October 28, 1983. In that Order we concluded, *inter alia*, that WU did not realize significant cost savings in handling IRC-interconnected Telex/TWX traffic as opposed to public domestic Telex/TWX traffic, and that the IRCs were not entitled to a discounted rate. The *Final Decision*, was affirmed on appeal to the Court of Appeals for the Second Circuit, which found "substantial evidence to support the Commission's conclusion that WU's public rates were reasonable and that the IRCs are not entitled to a discount."[12]

II. CONTENTIONS OF PARTIES

14. In its petition for reconsideration/clarification, WU contends that the Commission's finding in the *Final Decision* that WU did not realize a cost savings in providing Telex/TWX service to the IRCs is tantamount to a decision that the discounts taken unilaterally by the IRCs during the disputed period were taken wrongfully. As a result, the Commission "should amend its Final Decision to make clear that the IRCs are obliged to make Western Union whole for the deficiencies it suffered during this period." WU Petition at 7. WU separates its claim into two time periods — from August 10, 1978 until the ALJ's prescription of

[11] The Western Union Telegraph Company, Initial Decision in Phase I of CC Docket No. 78-97, 95 FCC 2d 924 (1982).

[12] FTC Communications, Inc., v. F.C.C., 750 F.2d 266, 230 n.5 (2d Cir. 1984).

outbound rates on July 24, 1979, and from January 1, 1978 until August 10, 1978.[13] WU estimates that the IRCs' wrongful withholdings amount to $7.6 million for the former period and $1.7 million for the latter, and claims that the entire amount is a windfall to the IRCs, which allegedly earned excessive rates of return during those periods.

15. The IRCs filed replies to the WU petition on December 20, 1983. FTC Communications, Inc. (FTCC), states that it paid the full rates charged by WU during the periods in question, and that WU has no claim against it. It nevertheless concurs in the arguments of the other IRCs. ITT World Communications, Inc., (ITT), RCA Global Communications, Inc. (RCAGC), TRT Telecommunications Corporation (TRT) and Western Union International, Inc. (WUI) filed a joint Opposition of the International Record Carriers that opposed the WU petition on a number of different grounds. They first argue that Section 1.106 of the Commission's Rule, 47 C.F.R. §1.106, lists standards for a petition for reconsideration and presumedly establishes that such a petition is not a proper vehicle for a claim for damages. The RICs also assert that the two-year statute of limitation under Section 415 of the Act, 47 U.S.C. §415, lapsed at the end of July 1981, thus precluding consideration of the WU claim. The IRCs further maintain that because WU did not raise its claim by filing an exception to the ALJ's Initial Decision, it thereby waived its claim by operation of Section 1.277(a) of the Commission's Rules, 47 C.F.R. § 1.277(a).[14]

16. The IRCs next argue that the 1975 and 1976 settlement agreements continued as a matter of law. They interpret former Section 222 of the Act, 47 U.S.C. §222, as prescribing any rates other than those established through agreement between WU and the IRCs or by Commission prescription. Because neither of these conditions supposedly occurred during the period in question, the

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[13] These two time periods supposedly represent the periods before and after the Commission began to review the Telex/TWX rates for IRC traffic. WU erroneously states that August 10, 1978 is the date that the outbound rates were rejected. Those rates were rejected, and the inbound rates suspended, on May 9, 1978, in the *IRC Telex/TWX Order*. This error does not, however, affect our decision in this issue.

[14] Section 1.277(a) of the Commission's Rules, 47 C.F.R. § 1.277(a) states that

> [t]he consolidated supporting brief and exceptions to the initial decision . . . shall point out with particularity alleged material errors in the decision or ruling and shall contain specific references to the page or pages of the transcript of hearing, exhibit or order if any on which the exception is based. Any exception not saved by exception filed pursuant to this section is waived.

1975-1976 settlement agreement rates are said to have remained the "filed rates." The IRCs further argue that the filed rate doctrine proscribes any unilateral departure from established rates.[15] Thus, they say, rates effective on December 31, 1977 remained in effect until changed by the lawfully effective tariff of August 10, 1978 and the prescription of July 24, 1978.

17. The IRCs characterize WU's petition as a request for retroactive ratemaking. They contend that WU's claim is prohibited by Section 201(a) of the Act, 47 U.S.C. § 201(a), and by former Section 222(e) of the Act, 47 U.S.C. § 222(e), which was in effect at the time. The IRCs also allege that a retroactive decision would be fundamentally unfair, because they would not be able to pass the costs on to their customers. Finally, the IRCs argue that WU does not cite the sections of the Act that provide for any claimed recovery and does not state any theory of damages. The IRCs assumes that WU is proceeding on a *quantum meruit* theory and include data purporting to show that WU's earnings during the disputed period were excessive. According to the IRCs, these earnings show that WU was not undercompensated, and thus suffered no harm. In addition, the IRCs state that WU's claim that it was underpaid by $9.3 million was never established at the trial level.

18. WU filed its reply to the IRC opposition on December 30, 1983. WU disputes the IRC arguments that its claim is barred by Section 1.106 of the Commission's Rules and by the Section 415 statute of limitations. WU also disputes the IRCs' contention that it failed to state a theory of damages, saying that its petition does not assert a claim for money damages, but seeks "a complete resolution of the issue of divisons — an issue which has been part of this [Docket 78-97] proceeding since its inception." WU Reply at 9. Similarly, WU states that it did not waive its claim by failing to file an exception to the ALJ's Initial Decision because such an exception was implicit in WU's filed exception to the ALJ's findings that the IRCs were entitled to a discount off the public rates. WU contests the IRC assertion that the 1975-1976 settlement rates were kept in effect by operation of the filed rate doctrine, stating that the doctrine is inapplicable here because no filed rates were in effect during the period in question.

19. WU further contests the IRCs' characterization of its petition as a plea for retroactive ratemaking on the grounds that no final rates existed, only an investigation that later concluded

[15] See discussion of the filed rate doctrine in para. 23, *infra*.

in a rate prescription. WU argues that the Commission has statutory authority to establish rates retroactively in cases where no rates were in effect. In addition, WU states that the requested relief would not be unfair to the IRCs because they earned excessive profits during the periods at issue. Finally, WU categorically rejects the IRC data purportedly showing excessive rates of return for WU in 1978 and 1979, and claims that the asserted IRC underpayment of $9.3 million was established at the trial level.

III. DISCUSSION

A. The Nature of the WU Claim

20. The IRCs deny that WU has stated a cause of action upon which we can grant relief. First, they argue for dismissal of the petition under Section 1.106(d) of our Rules, 47 C.F.R. § 1.106(d). That rule requires that apetition for reconsideration "shall state with particularity the respects in which petitioner believes the action taken by the Commission . . . should be changed . . ." and "shall state specifically the form of relief sought . . . . " The WU petition states:

> Now that it has been determined that Western Union's rate of return during the relevant period has *not* excessive and that the IRCs were not entitled to the discount they enjoyed, the Commission should put matters right and make clear that the IRCs owe Western Union the difference between the public rates and the discounted rates they actually paid.

WU Petition at 8 (emphasis in original). In addition, the petition states with particularity the amounts allegedly underpaid and the dates during which the underpayments allegedly took place. Accordingly, we reject the IRCs' argument and find that WU's claim is stated with ample specificity for purposes of Section 1.106(d).

21. We further reject the IRCs' contentions that WU's claim is not properly the subject of a petition for reconsideration of our *Final Decision*. WU's claim clearly flows from our *Final Decision*. It was not until the time of that decision that we determined finally that the IRCs were not entitled to a discount from the public Telex/TWX rates. WU now is asking us to clarify that this determination applies to the entire period of its dispute with the

IRCs. We find that this is appropriate to the extent indicated below.[16]

22. The IRCs claim that, if the WU petition is characterized as a formal complaint, it is barred by the statute of limitation established in Section 415 of the Act, 47 U.S.C. §415. IRC Opposition at 4. We cannot accept the IRCs' classification of the WU Petition as a formal complaint. Even if we assume, *arguendo*, that such a classification is legitimate, the Section 415 statute of limitations would not begin to run until "discovery of the right or wrong or of the facts on which such knowledge is chargeable at law." See *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming From the Comparative Hearing Process*, Docket No. 19154, Further Notice of Inquiry, 31 FCC 2d 443, 454 (1971). Thus, WU did not discover the basis for its claim — the finding that no cost savings were realized in IRC-interconnected Telex/TWX service — until the *Final Decision* was released on October 28, 1983. This conclusion is supported by *Western Union International, Inc. v. F.C.C.*, 652 F.2d 136 (D.C. Cir. 1980) (*WUI v. FCC*) (dismissing appeals of the *IRC Telex/TWX Order*), where the court dismissed WU's appeal of the *IRC Telex/TWX Order*, stating that the interim outbound rates established by the ALJ in July 1979 will

> continue in effect until a permanent prescription is made by the Commission in CC Docket No. 78-97. If dissatisfied with this prescription, WU may appeal the Commission's determination to this court. At that time WU may also assert its claims for any restitutionary relief to which it believes it is entitled.

WUI v. FCC, 652 F.2d at 146 (footnote omitted). In so stating, the court explicitly acknowledged that appeals of Commission decisions in the Docket 78-97 investigation would be considered interlocutory and that claims based on those decision would not be actionable until the *Final Decision* was released. WU's petition was filed within 30 days of that date.

23. The IRCs also claim that WU is not entitled to relief because the rates they paid WU for Telex/TWX service during the periods in dispute were the legally effective rates. This argument

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[16] The IRCs claim that WU is not entitled to the relief it requests because it "has not even claimed, much less shown that the monies actually paid . . . were insufficient to adequately compensate Western Union." IRC Opposition at 3. We find this claim irrelevant. But for the IRCs' erroneous claim that they were entitled to a discount and their refusal to cooperate, WU would have been entitled to non-discounted rates from the IRCs. As we indicate in the text, we do not believe that the IRCs should benefit from their recalcitrance.

presumedly is based on the filed rate doctrine, which establishes that, "[o]nce a rate is filed or fixed, it 'has the force of law . . . . [U]tilities are prohibited from demanding and collecting rates other than those filed with the Commission.' "[17] The 1975-1976 settlement agreements were the last effective rates filed with the Commission prior to January 1, 1978. The IRCs contend that, although those agreements "expired" by their own terms on that date, the filed rate doctrine caused the agreements to remain in effect until new filed rates were established by tariff on August 10, 1978, and by prescription on July 24, 1979. IRC Opposition at 10.

24. We disagree with the IRCs' construction of the filed rate doctrine. Nothing in the case history construing the doctrine indicates that the doctrine serves to perpetuate the effect of contractual agreements after their negotiated expiration date. WU states that "[a]pplication of the filed rate doctrine obviously depends upon there being effective rates on file." WU Reply at 4. Because the settlement agreements expired on January 1, 1978, no "filed rates" existed and the filed rate doctrine is not applicable.[18]

25. In addition, WUI, which joins in the IRC opposition and argues for application of the filed rate doctrine in this case, pursued a contrary argument before the Commission earlier in the Docket 78-97 investigation. After the 1975-1976 settlement agreements expired on January 1, 1978, WU argued that provisions of the contracts that preceded those agreements were automatically revived. WUI argued against this contention, asserting that "no agreement is presently in effect as to charges for Telex or TWX." *IRC Telex/TWX Order*, 68 FCC 2d at 111. We accepted WUI's argument, finding that "it seems clear that the 1975-1976 charge schedule expired on December 31, 1977, leaving no contract rates in effect." *Id.* Neither WUI nor the other IRCs have presented us with any arguments that would compel us to reverse that finding. We therefore find that the IRCs' argument that the filed rate doctrine kept the provisions of the 1975-1976 settlement agreements in force during the periods in question is without merit.

[17] IRC Opposition at 8-9, citing Main Public Service Co. v. F.P.C., 579 F.2d 659, 666 (1st Cir. 1978).

[18] WU further contends, and we agree, that the interpretation of the doctrine proposed by the IRCs is unsupported by the rationale underlying the doctrine, which seeks to ensure regulatory agencies' primary jurisdiction over rates, and to keep the agencies informed of the rates being charged. *Id. See* Cleveland v. F.P.C., 525 F.2d 845, 854 (D.C. Cir. 1976), *cited with approval in* Arkensas Louisiana Gas Co. v. Hall, 453 U.S. 571, 578 (1981).

26. The IRCs raise one final argument against the WU petition, stating that WU "did not choose to raise the claim by way of an exception to the Initial Decision of the Administrative Law Judge. Therefore, they say, Western Union was waived its claim by operation of Section 1.277(a) of the Commission's Rules." IRC Opposition at 5. We do not believe that Section 1.277(a) bars a petition for reconsideration/clarification in this case. WU preserved its right to raise its claim when it filed its general exception to the *Initial Decision*. WU states that an exception in support of its petition for a resolution of the devisions issue was "implicit in Western Union's exceptions to the ALJ's failure to find that the IRCs were not entitled to a discount from the usage rates applicable to the general public." Because the findings in the *Initial Decision* supported an IRC discount, it is unrealistic to expect WU to have filed an exception that demanded a $9.3 million reimbursement from the IRCs. We accept WU's contention that its general exception to the ALJ's finding in favor of an IRC discount was sufficient to preclude waiver of its current petition.

B. The Relief to Be Granted

27. Upon examination of WU's request and the arguments of all the parties, we have decided to grant the relief request by WU only insofar as it goes to the outbound service provided to the IRCs. As we indicated in the *IRC Telex/TWX Order*, WU's rates for outbound service during this period were governed by former Section 222(e) of the Act. Under Section 222(e) the outbound rates could only be set by carrier agreement or Commission prescription. Neither existed from January 1978 to August 1979. This being the case, we conclude that full resolution of this matter requires that we set rates for this period, when no rates were in effect, [19] in accord with our determinations in the *Final Decision*. Accordingly, we conclude that WU was entitled to recover the full public rate for outbound Telex/TWX services from the IRCs for this period.

28. We deny WU's request insofar as it goes to inbound Telex/TWX rates. These rates were governed by normal carrier initiated filing procedures and thus, it was within WU's power — subject to the procedures codified in the Act — to establish these rates. Under these circumstances we do not believe WU is entitled to recover additional payments for inbound service.

29. The IRCs have argued that the Commission is without

[19] See discussion at paras. 24-25 *supra*.

authority to provide WU with any of the relief it requests, and claim to support their position on precendential, statutory and equitable grounds. The IRCs cite *Nader v. Federal Communications Commission*, 520 F.2d 182, 202 (D.C. Cir. 1975) for the proposition that it is "a cardinal principle of ratemaking that a utility may not set rates to recoup past losses, nor may the Commission prescribe rates on that principle." IRC Opposition at 10. The IRCs' contention premised on their argument that the 1975-1976 settlement agreement rates remained effective during the period in question by operation of the filed rate doctrine. We reject this contention and reiterate our finding that no outbound rates were effective from January 1, 1978 until July 24, 1979.

30. We reject the IRCs' arguments that this grant of relief is proscribed retroactive ratemaking. We adhere to our belief, as stated in the *Rejection Order*, "we have ample authority to frame a remedy which will afford a party relief for a past period in which it was inequitably or unlawfully treated." 71 FCC 2d at 630. This position is supported by a number of court decisions. Most recently, in *Bell Telephone Company of Pennsylvania v. F.C.C.*, No. 84-1259 (D.C. Cir., May 14, 1985), the court held that, after a reconsideration proceeding had been completed, the retroactive adjustment of rates established pursuant to exchange network facilities for interstate access (ENFIA) agreements was compatible with the statutory scheme of Section 203(c) of the Act, 47 U.S.C. § 203(c). *Id.* at 5, citing *ENFIA*, Order on Reconsideration, 93 FCC 2d 739 (1983) and *Hall v. F.E.R.C.*, 691 F.2d 1184 (5th Cir. 1982), *cert. denied* 104 S. Ct. 88 (1983).

31. The fact that the Act does not contain language specifically empowering the Commission to make retroactive rate adjustments in certain circumstances does not deny us this power. In *FTC Communications, Inc. v. F.C.C.*, 750 F.2d 226 (2d Cir. 1984), the Court of Appeals denied FTC's appeal of our *Final Decision*. The court found that, although there was no direct statutory authority that empowered the Commission to set interim rates for Telex/TWX prior to the completion of the Docket No. 78-97 investigation, such authority was implicit in Section 4(i) of the Act, 47 U.S.C. § 154(i). The court stated that, absent this authority, "the IRCs would have every incentive to refuse to negotiate with WU and to delay the resolution of the rulemaking process for as long as possible in order to keep the benefits of the lower, expired contract rates." *Id.* at 232, citing with approval *Lincoln Telephone and Telegraph Co. v. F.C.C.*, 659 F.2d 1092 (D.C. Cir. 1981).

32. The IRCs claim that former Section 222(e) of the Act, 47 U.S.C. § 222(e), bars this grant of relief. They state that:

> In its essential respects, former Section 222(e) was patterned by the Congress after Section 15(6) of the Interstate Commerce Act. Court decisions interpreting Section 15(6) make it quite clear that, both as a matter of law and equity, neither the Interstate Commerce Commission nor the Courts may retroactively adjust *the agreed-upon divisions of charges* applicable to intercarrier freight movements . . . . These cases should be followed here.

IRC Opposition at 12, 14 (emphasis added). The IRCs attempt to support their argument with a number of cases decided under the Interstate Commerce Act.

33. Once again we reject this argument because, like the IRC's *Nader* argument, their Section 222(e) argument is premised on the belief that Telex/TWX rates were in effect during the periods in question. Because no such rates were effective, the WU petition does not constitute a request for retroactive ratemaking.

34. In fact, we believe that Section 222(e) provides greater support for our action. As we stated in the *Rejection Order*, Section 222(e) empowers the Commission to set outbound rates for periods during which no rates were in effect. We repeat:

> in our opinion Section 222(e) implicitly empowers the Commission to determine a proper division of charges for periods during which the parties were unable to reach an acceptable agreement. Absent this power, where carriers fail to agree, there would be no remedy during the hiatus period prior to Commission prescription. The failure of the Commission to act in a situation such as this could lead to basic unfairness and possibly, even the cessation of service in extreme cases, an outcome hardly envisioned by Congress. This is not a case where Commission determined charges would supersede a contract rate or tariff rate applicable at the time the service was provided. The fact is that no rates were in effect during the periods in question. We believe that in this unique circumstance we may decide upon reasonable charges for application during these periods, provided the carriers ultimately are unable to reach an acceptable resolution of their differences.

Rejection Order, 71 FCC 2d at 630 (footnote omitted). To accept the IRCs' argument would establish that, by maintaining an intransigent negotiating position, the IRCs could unilaterally extend the low expired rates until the Commission could complete a hearing and prescribe interim or final rates. Thus, the language of Section 222(e) indicates a conclusion opposite to that urged by the IRCs. We therefore find that Section 222(e) enables us to provide the retroactive relief sought by WU.

35. The final IRC argument relies on equitable principles, stating that the retroactive action requested by WU would be "unduly harsh to the IRCs, in that they cannot now adjust the through rates long since paid by their customers." IRC Opposition at 10-11, 14-15. WU replies that the requested $9.3 million reimbursement would not be unduly harsh to the IRCs, because their earnings during the periods in question were excessive and because the IRCs "have not shown that the additional divisions would have reduced their rates of return to inadequate levels such as to justify increasing their rates. Indeed, their claim is belied by their failure to adjust those rates to reflect the increases in divisions which became effective in August 1978 and July 1979." WU Reply at 8-9 (footnote omitted).

36. We need not address WU's allegations of excessive IRC earnings in order to resolve this issue. The IRCs' argument that an order to reimburse WU would be unduly harsh because they cannot pass on the additional costs to their customers lacks merit. The IRCs were aware that their contracts with Western Union had expired at the end of December 1977. The IRCs were further aware that because there were no rates in effect after expiration of the contracts, the Commission might exercise its discretion to prescribe rates. As a result, the IRCs were on notice that their actions in unilaterally perpetuating this discount in the rates they paid to WU might be disapproved by this Commission. In fact, the Docket 78-97 proceedings are rife with language in which this Commission questioned the propriety of an IRC discount and the departure from using the currently effective public rates as a benchmark for IRC rates, and disapproved the unilateral withholding of funds from WU.

37. For example, this Commission's doubts that substantial cost savings existed were stated at the inception of the Docket 78-97 investigation. In May 1978, we rejected an IRC demand that WU provide disaggregated cost data, stating that "[w]e believe that any differences [in cost] which can be shown to exist are minor from an overall systems point of view and do not significantly affect the important cost determinants of truck engineering, switching configuration, or network routing." *IRC Telex/TWX Order*, 68 FCC 2d at 116. We reiterated this belief in April 1979, stating that "[i]nasmuch as WU uses virtually the same facilities to provide service to the IRCs and public domestic users, there does not appear to be any justification . . . for significantly different rate treatment for these two classes of

customers." *Rejection Order*, 71 FCC 2d at 629.[20]

38. The IRCs were also on notice that their method of computing the discount was not acceptable to this Commission. By tariffs effective August 10, 1978, WU increased its public rates for Telex/TWX service. After that date, however, the IRCs continued to pay rates equivalent to a 5.5 percent discount off the *old* public rates. WU Petition at 6. The failure to use currently effective public rates as a benchmark for IRC rates has been repeatedly and consistently disapproved. In the *IRC Telex/TWX Order*, we stated that the "use of the public Telex/TWX tariff rates as a benchmark for determining IRC charges, which to us seems the most reasonable and equitable approach, appears to be the only clear area of agreement between the parties [WU and the IRCs] . . ." *IRC Telex/TWX Order*, 68 FCC 2d at 122. We reiterated this position in an Order denying reconsideration of the *IRC Telex/TWX Order. The Western Union Telegraph Company*, CC Docket 78-97, 69 FCC 2d 924, 931 (1978).

39. Ultimately, we rejected the proposed WU/IRC rate agreements of January 1979, partly because

> [b]y ignoring the October 1, 1978 increases, the parties have departed from their longstanding practice of basing IRC charges on the public domestic tariff rates applicable at the time. By neglecting to tie the settlement rate schedules to subsequent changes in comparable public tariff rates, the parties leave open the door to future disputes and the further divergence of applicable IRC and public rates for essentially the same service.

Rejection Order, 71 FCC 2d at 629.

40. Finally, we expressed our belief that the IRCs' practice of withholding funds was not in the public interest, stating that

> [t]he parties have been before the courts and the Commission on a number of occasions, and at times their inability to agree has resulted in the withholding of substantial payments. Although we have no indication to date that the unstable climate in which the parties operate has jeopardized the continued provision of overseas Telex and TWX services to the public, or impaired WU's Telex and TWX public offerings, we feel we cannot ignore the possibility that this prolonged state of discord may have adverse public interest consequences.

IRC Telex/TWX Order, 68 FCC 2d at 122 and n. 68.

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[20] The opposite conclusion was drawn by the ALJ in the *Initial Decision*, but this decision was not released until March 1982, and cannot have been relied on to justify the unilateral discounts taken by the IRCs during 1978 and 1979. During the period in question, the Commission consistently expressed its doubts that significant cost differences existed.

41. In the face of our statements questioning or disapproving the IRC actions during 1978 and 1979, the IRCs cannot argue persuasively that granting the relief sought by WU would be inequitable. The IRCs justified their unilateral arrogation of a discount with a cost savings argument that was contested and subject to investigation, failed to use currently effective public rates as a benchmark in contravention of Commission decisions, and withheld payments in the face of a Commission determination that the practice disserved the public interest. In so doing, the IRCs were well aware of the possibility that they eventually would have to make the reimbursement now considered. In light of these actions, we deny that requiring the IRCs to make restitution to WU would be "unduly harsh." On the contrary, to allow the IRCs to profit from their recalcitrance would be to deny equity to WU. We find that a grant of the requested relief is equitable to WU and will provide a disincentive for contentious and unilateral action among the parties in the future. Because this action promotes equitable and reasonable dealings among providers of domestic and international record services, it serves the public interest.

IV. CONCLUSION

42. We have found that WU's petition for reconsideration/clarification of our *Final Decision*, properly requests reimbursement of discounts from the public Telex/TWX rates taken by the IRCs for outbound service taken between January 1, 1978 and July 24, 1979. The IRCs justified these discounts by arguing that WU realized significant cost savings in providing Telex/TWX service to the IRCs, as opposed to the general public. Our decision to require the IRCs to reimburse WU for the amounts withheld follows from our finding in the *Final Decision* that no significant cost differences exist. We find that a grant of the relief requested by WU is just, reasonable and equitable, and serves the public interest.

43. We require that WU recalculate the amount of its claim and submit data to support the claim. Specifically, we require that WU submit information concerning the following:

A) A calculation of the amounts withheld by the IRCs for outbound service based on actual minutes billed, including interest calculated at the rate established by the Commissioner of the Internal Revenue Service.

B) An allocation of the claim to each of the IRCs.

V. ORDERING CLAUSES

44. Therefore, IT IS ORDERED that the petition for reconsideration/clarification filed by The Western Union Telegraph Company is GRANTED to the extent specified in this Order and is otherwise DENIED.

45. IT IS FURTHER ORDERED, that The Western Union Telegraph Company shall submit the information required in paragraph 43, *supra*, not later than 30 days after the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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